154 U.S. 413

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

No. 1167.

JOHN H. REAGAN, W. P. McLEAN, L. L. FOSTER, AND C. A. CULBERSON, APPELLANTS,

vs.

THE MERCANTILE TRUST COMPANY, TRUSTEE, AND THE TEXAS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED MARCH 31, 1894.

(15,551.)

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a MARCH 28TH, 1893.

Be it remembered that there was opened and begun to be holden a regular term of the United States circuit court of fifth circuit and western district of Texas at the city of Austin, in said circuit and district, on the 6th day of February, 1893, it being the first Monday in February and the day fixed by law for commencing a regular term of said court at said place.

Present: The Honorable Andrew P. McCormick, one of the circuit judges of the United States for the fifth circuit; A. J. Evans, United States attorney for said district; Paul Fricke, United States marshal for said district, and B. G. Duval, clerk of said court.

When and where the following proceedings were had, to wit:

In the Circuit Court of the United States for the Western District of Texas, in the Fifth Circuit. In Equity.

THE MERCANTILE TRUST COMPANY, Trustee, Complainant, *against* THE TEXAS AND PACIFIC RAILWAY COMPANY, JOHN H. REAGAN, *et al.*, Defendants. } No. 186.

1 No. 186. Equity.

In the United States Circuit Court for the Western District of Texas, in the Fifth Circuit. In Equity.

THE MERCANTILE TRUST COMPANY, Trustee, Complainant, *against* THE TEXAS AND PACIFIC RAILWAY COMPANY, JOHN H. REAGAN, *et als.*, Defendants. } No. 186.

Bill of Complaint.

Farrar, Jonas & Kruttschnitt, 33 Carondelet street, New Orleans, La.; Alexander & Green, 120 Broadway, New York city, and West & McGown, Austin, Tex., complainant's solicitors.

John F. Dillon, John J. McCook, E. B. Kruttschnitt, of counsel.

Filed April 30, '92.

B. G. DUVAL, *Clerk*,
By D. H. HART.

1½ To the judges of the circuit court of the United States for the western district of Texas, in the fifth circuit, sitting in equity:

The Mercantile Trust Company, a corporation organized and existing under the laws of the State of New York, brings this, its bill of complaint, against the Texas and Pacific Railway Company, a corporation organized and existing under the laws of the United States; John H. Reagan, William P. McLean and L. L. Foster, citi-

zens and residents of the State of Texas, constituting the railroad commission of Texas, organized under an act of the legislature of the State of Texas, approved April 3, 1891, and Charles A. Culberson, a citizen and resident of the State of Texas, and attorney general of said State:

And thereupon humbly complaining, your orator, The Mercantile Trust Company, shows unto your honors as follows:

First. Your orator is a corporation organized and existing under the laws of the State of New York, and a citizen and resident of said State; that the defendant The Texas and Pacific Railway Company is a corporation organized and existing under the laws of the United States, to wit, an act of the Congress of the United States, approved March 3, 1871, and acts of Congress supplemental thereto and amendatory thereof; that the defendants John H. Reagan,
2 William P. McLean and L. L. Foster are citizens and residents of the State of Texas, and constitute the railroad commission of Texas, and they derive any and all power, authority and character as such commission, and in respect to the matters hereinafter complained of, from and under an act of the legislature of the State of Texas, approved April 3, 1891, entitled, "An act to establish a railroad commission for the State of Texas, whereby discrimination and extortion in railroad charges may be prevented, and reasonable freight and passenger tariffs may be established; to prescribe and authorize the making of rules and regulations to govern the commission and the railroads, and afford railroad companies and other parties adequate remedies; to prescribe penalties for the violation of this act, and to provide means and rules for its enforcement." A copy of said act, marked "Exhibit B," is filed herewith as part hereof.

That said act fixes and establishes the office of said railroad commission of Texas, at the city of Austin, in the county of Travis, in said State of Texas; and said commission, and said Reagan, McLean and Foster as such commissioners, are residents and inhabitants of said Travis county, and of the western district of said State of Texas.

That the defendant, Charles A. Culberson, is a citizen and resident of the State of Texas, and of the said city of Austin and county of Travis in said State, and an inhabitant of the western dis-
3 trict, and is the attorney general of said State, and claims as such attorney general the right to exercise the powers and to perform the duties purporting to be conferred and imposed upon the attorney general of said State by said act of the legislature of the State of Texas last hereinabove referred to.

Second. That by said acts of the Congress of the United States, creating the defendant The Texas and Pacific Railway Company, said railway company was, among other things, empowered and authorized to lay out, locate, construct, furnish, maintain and enjoy a continuous line of railroad and telegraph line with the appurtenances from a point at or near Marshall, in the county of Harrison, State of Texas; thence by the most direct and eligible route to be determined by said company, near the 32d parallel of north latitude

to a point at or near El Paso; thence by the most direct and eligible route to be selected by said company through New Mexico and Arizona to a point on the Rio Colorado at or near the southeastern boundary of the State of California, and thence by the most direct and eligible route to San Diego, California, to ship's channel in the bay of San Diego, in the State of California, pursuing, in the location thereof, as near as might be, the 32d parallel of north latitude. And said railway company was in and by said act invested with all the powers, privileges and immunities necessary to carry into effect the purposes of said act. And, among other things, the said
4 The Texas and Pacific Railway Company was by said act authorized and empowered to purchase the stock, land grants, franchises and appurtenances of, and consolidate on such terms as might be agreed upon between the parties, with any railroad company or companies theretofore chartered by congressional, State or territorial authority on the route prescribed by the 1st section of said act. And said railway company was in and by said act of incorporation authorized to make and enforce rules and by-laws for the election of its officers and the government and management of the business of the company, and to do and perform all needful and proper things to be done and performed to promote the objects of the company thus incorporated not inconsistent with the laws of the United States and the provisions of its said charter.

Third. That under and by virtue of the powers and authority in and by said act and acts of Congress conferred upon the said The Texas and Pacific Railway Company, the said railway company built, constructed and acquired, and at all times hereinafter mentioned and owned and operated, a line of railway extending from a point on the State line between the States of Louisiana and Texas westwardly to Marshall, and from Marshall by way of Dallas to Fort Worth in the State of Texas; and from Texarkana on the State line between Texas and Arkansas to its junction via Clarksville, Paris, Bonham, Sherman and Whitesboro, with the
5 main line aforesaid at Fort Worth; and from Marshall aforesaid through the town of Jefferson to its junction at or near Texarkana with the said line from Texarkana to Fort Worth; and from Fort Worth aforesaid to a junction with the Southern Pacific railway at Sierra Blanca, at which point it unites and connects with the Galveston, Harrisburg and San Antonio railroad; all of said line and lines of railway being situate within the State of Texas, and also a line of railroad formerly known as the New Orleans and Pacific Railway extending from Shreveport to the town of Goldsboro, opposite the city of New Orleans, and including a branch to Baton Rouge, all in the State of Louisiana, being about 336 miles in said last-mentioned State. And said railway company acquired and at all said times has enjoyed the right of joint use of the of road of the Galveston, Harrisburg and San Antonio Railroad Company between Sierra Blanca aforesaid and El Paso, a distance of about 94 miles in the State of Texas, and also the right of way and a partially constructed line of railroad from Sierra Blanca to El Paso in said last-mentioned State; and said railway company ac-

quired, and has at all of said times owned and enjoyed a leasehold interest in the line of railroad of the Vicksburg, Shreveport and Texas Railroad Company, extending from Shreveport, in the State of Louisiana, to a connection on the main line of the railroad of the Texas and Pacific Railway Company at the State line between Louisiana and Texas.

6 And the said railway company at all of said times hereinafter mentioned owned, controlled, operated and enjoyed the property, rights, easements, and franchises mentioned and described in a certain indenture of mortgage or deed of trust made by and between the said The Texas and Pacific Railway Company and your orator, dated on the first day of February, 1888, a copy whereof, marked "Exhibit A," is filed herewith as part hereof.

Fourth. That under and in pursuance of the powers conferred upon said railway company in and by the said act of incorporation, and pursuant to due corporate action, the said The Texas and Pacific Railway Company did, on or about the first day of February, 1888, and at various dates thereafter make, execute, and deliver to various persons and for full value its 25,000 second-mortgage income bonds, each dated on the said first day of February, 1888, each for the sum of $1,000, payable to the bearer or the registered holder thereof on the first day of December, A. D. 2000, with interest thereon payable out of the net earnings of the railway company, as the same might be determined by its board of directors, at the rate of five per cent. per annum from December first, 1887, in gold coin of the United States, at the office or agency of the railway company in the city of New York.

And for the purpose of securing said bonds said railway company, pursuant to and in accordance with like charter and corporate

7 authority, made, executed and delivered to your orator, as trustee, its indenture of mortgage or deed of trust known as its second mortgage, conveying to your orator, in trust for the security of the holders of said bonds, all of the lines of railroad, property, appurtenances, rights and franchises hereinbefore referred to, together with all the rents, issues, profits, tolls, and all other income of said railroad; all of which are more specifically described in said mortgage, a copy whereof, including copy of one of said bonds uniform with all others of like issue, except in respect to number, is filed herewith, as aforesaid, marked "Exhibit A."

That the interest upon the said second-mortgage bonds of said railway company is payable, as aforesaid, out of the net income of the railway company as the same may be determined by its board of directors, at the rate of 5 % per annum from December 1, 1887. And the said bonds contain the following provisions:

"Provided, however, that interest hereon shall be payable to the extent only that such net income, if any, permits, and that interest hereon shall be noncumulative."

And said mortgage to your orator as trustee provides, among other things, as follows:

"That it (the Texas and Pacific Railway Company) shall and will well and truly pay, or cause to be paid, to the holders of the

second-mortgage bonds to be issued hereunder, as heretofore stated, or of such of the second-mortgage bonds as shall from time to
8 time be outstanding and secured hereby, and every one of them, the principal thereof, according to the true intent and meaning thereof, and pay interest on said principal sum to the rate of five per cent. per annum from December 1, 1887; payable annually on the first day of March in each year, the first payment, if any, to be due March 1st, 1889, in like gold coin, out of the net income of the railway company as the same may be determined by the board of directors of the railway company. If the income of the railway company applicable for the interest on said bonds shall not, in the judgment of the board of directors, be sufficient to pay the said interest in full, such interest or so much as shall remain unpaid shall not accumulate." * * *

Fifth. That the obligation of the defendant railway company to pay the interest upon the bonds secured by said mortgage to your orator, as trustee, and the lien of said last-mentioned mortgage are subordinate and inferior to the obligation of said railway company to pay the interest upon the indebtedness stated and described in the schedule hereinafter in this paragraph included, and to the lien of the several mortgages securing such prior indebtedness, to wit:

(1) $147,109.48, known as the "Texas school-fund loan," received by the said railway company from the State of Texas under the provisions of an act of the legislature of said State, entitled An act to provide for the investment of the special school fund in the bonds of the railroad companies incorporated by the State, approved Au-
gust 3, 1856, and the acts of the legislature supplemental
9 thereto and amendatory thereof, the payment of which said loan, together with interest thereon, at the rate of 6 % from the date of such loan, and an additional annual payment of 2 % as a sinking fund upon the outstanding principal of said loan, are provided by bonds of said railway company deposited with the State of Texas and secured by a lien upon the property and franchises of said railway company, provided for and reserved in the said acts of the legislature of the State of Texas.

(2) $3,784,000 of the bonds of said railway company, known as the first-mortgage Eastern Division bonds, maturing on the 15th day of March, 1905, bearing interest at the rate of 6 % per annum, the payment of the principal and interest whereof is secured by a first mortgage, covering the Eastern division of the Texas and Pacific railway, executed May 15th, 1875, to Matthew Baird and Samuel L. Felton, trustees.

(3) $25,000,000 first-mortgage bonds dated February, *February* 1, 1888, and secured by a first mortgage covering all the railroad and property and franchises of the railway company, which are described in said second mortgage to your orator as trustee. Said bonds bear interest at the rate of 5 % per annum and mature on the first day of June, A. D. 2000.

That all of the indebtedness and obligations of the said railway company hereinabove described are outstanding, except that

$3,951,000 of the first-mortgage bonds, last above mentioned,
10 are deposited with the trustee of said first mortgage, to retire the prior mortgage indebtedness to the State of Texas and to holders of the Eastern Division bonds above described.

Your orator prays leave to refer, upon the trial of this cause, to said acts of the legislature of the State of Texas touching said school-fund loan and to the several prior mortgages above recited.

Sixth. Your orator further says that the twenty-second legislature of the State of Texas passed an act entitled "An act to establish a railroad commission for the State of Texas whereby discrimination and extortion in railroad charges may be prevented and reasonable freight and passenger tariffs may be established; to prescribe and authorize the making of rules and regulations to govern the commission and the railroads and afford railroad companies and other parties adequate remedies; to prescribe penalties for the violation of this act and to provide means and rules for its enforcement," which said act was approved April the 3d, 1891, from which date it took effect. A copy of said act of the legislature of the State of Texas last mentioned, marked "Exhibit B," is herewith filed. That the said act was passed and adopted by said legislature in claimed pursuance of the powers conferred upon said legislature by an amendment to the present constitution of the State of Texas, which amendment was adopted at an election held throughout said State on the 5th day of November, 1890, and said amendment is as follows:

11 Article 2. Railroads heretofore constructed or which may hereafter be constructed in this State are hereby declared public highways and railroad companies common carriers. The legislature shall pass laws to regulate railroad freight and passenger tariffs, to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and enforce the same by adequate penalties; and to the further accomplishment of these objects and purposes may provide and establish all requisite means and agencies, invested with such powers as may be deemed adequate and advisable.

That the said Reagan, McLean and Foster were appointed and qualified as such commissioners in the manner prescribed by section 1st of said act and organized said commission on the 10th day of June, 1891, from which date they have assumed to be and act as the railroad commission of Texas, and are exercising and claiming the right to exercise, the power and functions conferred or purporting to be conferred, by said act upon said railroad commission. That said act purports to confer the power and authority upon said railroad commission of Texas and make it the duty of the commission, among other things, to adopt all necessary rates, charges and regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs upon the railroads in said State, and to enforce the same by hav-
12 ing penalties inflicted as by said act prescribed through the proper courts having jurisdiction. To fairly and justly clas-

sify and subdivide all freight and property, of whatsoever character that may be transported over the railroads in said State into such general and special classes or subdivisions as may be found necessary and expedient. To fix to each class or subdivision of freight a reasonable rate for each railroad, subject to said act for the transportation of each of said classes and subdivisions. To fix different rates for different railroads, and for different lines under the same management, or for different parts of the same line, if found necessary to do justice. To fix and establish for all or any connecting lines of railroad in said State reasonable joint rates or freight charges for the various classes of freight and cars that may pass over two or more lines of such railroad, and if any two or more connecting railroads shall fail to agree upon a fair and just division of the charges arising through the transportation of freight, passengers or cars over their lines, the commission is required by said act to fix the *pro rata* part of such charges to be received by each of said connecting lines.

Said act also provides in effect that until the commission shall make the classifications and schedules of rates therein provided for, and afterwards if they deem it advisable, they may make partial or special classifications for all or any of the railroads subject to said act, and fix rates to be charged by such roads therefor,
13 and such classification and rates shall be put in effect in the manner provided for general classifications and schedules of rates. And the said act provides that the said commission shall have power, and it shall be its duty from time to time, to alter, change, amend or abolish any classification or rate established by it when deemed necessary, and such amended, altered or new classification or rates shall be put into effect in the same manner as the original. And the said commission is authorized by said act to adopt and enforce such rules, regulations and modes of procedure as it may deem proper, and to hear and determine complaints that may be made against the classification, or the rates, rules, regulations and determinations of the commission.

Said act also purports and attempts to confer upon the commission the power to make reasonable and just rates and charges for each railroad subject to said act for the use or transportation of loaded or empty cars on its road, and to establish for each railroad, or for all railroads, the like reasonable rates for the storing and handling of freight and for the use of cars not unloaded at forty-eight hours' notice to the consignee, not to include Sundays. And the said act also purports to confer upon the commission the power, and to make it the duty of said commission, to establish reasonable rates for the transportation of passengers over each
14 or all of the railroads subject thereto, not to exceed the rates fixed by law, and also to prescribe reasonable rates, tolls or charges for all other services performed by any railroad subject thereto.

Said act, in effect, provides (section 4) that, before any rates shall be established under said act, the commission shall give the railroad company to be affected thereby ten days' notice of the time

and place when and where the rates shall be fixed, and the said railroad company shall be entitled to be heard at such time and place, to the end that justice may be done, and that it shall have process to enforce the attendance of its witnesses, which process shall be served as in civil cases.

Sections 5, 6 and 7 of said act are as follows:

"SEC. 5. In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations and classifications prescribed by said commission before the institution of such action shall be held conclusive, and deemed and accepted to be reasonable, fair and just, and in such respects shall not be controverted therein until finally found otherwise in a direct action brought for that purpose in the manner prescribed by sections 6 and 7 hereof.

"SEC. 6. If any railroad or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of
15 competent jurisdiction in Travis county, Texas, against said commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court at either of its terms, and such action so appealed shall have precedence in said appellate court of all causes of a different character therein pending: Provided, that if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days notice.

"SEC. 7. In all trials under the foregoing section the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts, or charges complained of are unreasonable and unjust to it or them."

By section 8 of said act it is made the duty of the said commission so soon as the classification and schedule of rates provided for in said act are prepared by them, to furnish each railroad subject to the provisions of said act with a complete schedule in suitable form showing the classification of freight made by them and the rates fixed by said commission to be charged by such roads for the transportation of each class of freight and cause a certified copy of such classification and schedule of rates to be delivered to each of
16 said railroads at its principal office in said State, if it has such office in said State, and if not, then to any agent of said company, which said schedule, rules and regulations shall take effect at the date which may be fixed by said commission not less than twenty days, and it is by said act made the duty of said railroad company to cause said schedules to be printed in type of a

size not less than pica and to have the same posted in a conspicuous place at each of its depots so as to be inspected by the public. And the said commission by said act are empowered to at any time abolish, alter or in any manner amend the said schedules or abolish or amend any such regulations, and, in that event, certified copies of the schedules, rules or regulations showing the change therein shall be delivered to each road as therein specified.

Neither said act nor any other law of the State of Texas requires said commission to publish schedules and rates specified in said act before the taking effect of the same, or to do any other act or thing in respect thereto, except as required by section 8 of said act hereinbefore recited.

It is provided in section 14 of said act, in effect, that if any railroad company subject to said act, or its agent or officer, shall thereafter charge, collect, demand or receive from any person, company, firm or corporation, a greater rate charged for compensation than that fixed and established by the railroad commission for the transportation of freight, passengers or cars or for the use of any car on the line of its railroad, or any line operated by it, or for re-
17 ceiving, forwarding, handling or storing any such freight or cars for any other service performed or to be performed by it, such railroad company and its agent or officer shall be deemed guilty of extortion, and shall forfeit and pay to the State of Texas a sum not less than $100 nor more than $5,000.

By section 17 of said act, it is provided, in effect, that in case any railroad subject to said act shall do or cause to be done, or permit to be done any matter, act or thing in said act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing therein required to be done by it, such railroad shall be liable to the person or persons, firm or corporation injured thereby, for the damages sustained in consequence of such violation; and in case said railroad company shall be guilty of extortion or discrimination as by said act defined, then in addition to such damages such railroad shall pay to the persons, firm or corporation injured thereby a penalty of not less than $125 nor more than $500, to be recovered in any court of competent jurisdiction in any county into or through which any railroad may run, provided that such road may show and prove, as a defense to the action for such penalty, that such violation was unintentional and innocently made through mistake of fact, and provided further that such recovery as therein provided shall in no manner affect a recovery by the State of the penalty denounced for such violation.

18 By section 18 of said act it is in effect provided that if any railroad as aforesaid shall wilfully fail in either provisions of said act or shall do any act therein prohibited, or shall fail or refuse to do any other duty enjoined upon it for which a penalty has not therein been provided for such act or violation, it shall pay to the State of Texas a penalty of not more than $5,000.

By section 19 of such act it is provided in effect that all of the penalties therein provided, except as provided in section 17, shall be recovered and suits thereon shall be brought in the name of the

State of Texas in the proper court having jurisdiction thereof in Travis county, or in any county from or through which such railroad may run, by the attorney general or under his direction.

By section 20 of said act it is provided in effect that on the application of any person, organization or firm the commission shall furnish certified copies of any classifications, rates, rules, regulations or orders, and such certified copies or printed copies published by authority of the commission, shall be admissible in evidence in any suit and sufficient to establish the fact that any charge, rate, rule, order or classification therein contained and which may be in issue in the trial is the official act of the commission.

Seventh. Your orator further avers that on or about the
19 21st day of June, 1891, the general freight agent of the Texas and Pacific Railway Company, received through the United States mail, a communications dated June 20th, 1891, a copy whereof is as follows:

Office of railroad commission of Texas.

AUSTIN, TEXAS, *June 20th*, 1891.

General freight agent T. & P. R'y.

DEAR SIR: In accordance with the requirements of section four of the act creating the railroad commission of Texas, passed at the regular session of the 22d legislature, and approved April 3, 1891, the railroad commission of Texas will, on Monday, July 6th, 1891, begin and continue from day to day, until completed, the classification and subdivision of all freight and property of whatsoever character that may be transported over the railroads of this State, into such general or special classes or subdivisions as may be found necessary or expedient, and the fixing for each class or subdivision of freight a reasonable rate for each railroad, subject to this act, for the transportation of each of said subdivisions or classes; also that at the above-named time and place a special classification, and rates of charges thereon, of cotton, grain, lumber and salt will be made. Your attention is also called to section eight of the act aforesaid, which provides that, in all cases where the rates shall not have been fixed by the commission, no changes shall be made, except after ten days' notice to, and consent of commission. Therefore, the changing of any rates in force June the 10th, 1891, except after notice as above provided, and the consent of the commission, is unlawful.

20 Please acknowledge the receipt of this notice, and oblige.

JOHN H. REAGAN, *Chairman.*

J. J. ARTHUR, *Secretary.*

Although said communication did not inform said railway company or its agents of the rates, or the changes in the then existing rates, which said commission proposed or intended to make at said time, still said general freight agent and other representatives of said railway company appeared before said commission at its office in the city of Austin at the time in said notice named and requested

said commission to indicate the rates they proposed to fix, and the changes they proposed to make in the then existing rates, for the transportation of property by said railway company, in order that the railway company should have the opportunity then to present any evidence it might be able to produce, appropriate and material to the action which the commission proposed or intended to take in the premises; which request the commission failed and refused to grant. That the agents and representatives of the railway company were therefore unable to produce testimony, appropriate or material, to any possible action of the commission, but the agents or representatives of said company at said time did present such information, of a general character, to said commission, as to them
21 seemed in any way appropriate or material to the matters upon which the commission had indicated its purpose to act, and as far as possible gave all information requested or suggested by said commission as material to such matters.

Shortly thereafter there appeared in the newspapers of the State a statement which, as your orator is advised and believes, was authorized by said commission, to the effect that the commission invited the presence of representatives of towns and cities, boards of commerce or individuals who might desire to present any matter or complaint to the said commission to be present on and after July 6, 1891.

That said defendant railway company did not in any way waive the giving of any notice required by law, but representative merely appeared before said railroad commission, as did other citizens and inhabitants of the State who had any concern or interest in the proceedings of the commission.

That the said commission did not, as it had declared its intention in said notice to do, fix said rates or any rates whatever at its said session, or indicate any time when it would fix such rates, but adjourned and deferred action upon the matter stated in said notice indefinitely, and terminated its session without action and without adjournment to any specified day.

That thereafter, and subsequently to July 29th, 1891, the general freight agent of the Texas and Pacific Railway Company received through the United States mail a communication from the
22 said railroad commission enclosing a proposed schedule of rates on corn, wheat, rye, barley, oats, bran, mill feed, mill stuff, hay, flour and meal in sacks or barrels, and salt in sacks or barrels, which said proposed schedule was accompanied by the following notice:

Office of railroad commission of Texas.

AUSTIN, TEXAS, *July* 29, 1891.

DEAR SIR: The schedule of rates on the commodities herein named is proposed by the railroad commission of Texas to the general freight agents of the several railroads in Texas for their consideration and such suggestions as they may see proper to make. Action will be had on this schedule August 5, and all communica-

tions relating thereto must be received by that date to receive attention of the commission.

JNO. H. REAGAN, *Chairman.*

J. J. ARTHUR, *Sec'y.*

That thereafter and subsequently to the 30th day of July, 1891, said general freight agent of said railway company received, through the United States mail, communications from said commission, including proposed rates on lumber, shingles and cotton, which communications are respectively as follows:

Office of railroad commission of Texas.

AUSTIN, TEX., *July* 30, 1891.

DEAR SIR: The schedule of rates herein proposed is submitted for the consideration of the general freight agents of the several railroads in Texas. Such suggestions in relation thereto as
23 they may desire to make must reach this office by August the 7th to receive attention from the commission.

JNO. H. REAGAN, *Chairman.*

J. J. ARTHUR, *Secretary.*

Office of railroad commission of Texas.

AUSTIN, TEXAS, *July* 31, 1891.

DEAR SIR: The schedule of rates herein proposed is submitted for the consideration of the general freight agents of the several railroads in Texas. Such suggestions in relation thereto as they desire to make must reach this office by August the 6th, to receive attention by the commission.

JNO. H. REAGAN, *Chairman.*

J. J. ARTHUR, *Sec'y.*

That the time within which, by the terms of said notice, communications or objections to such proposed rates upon the part of said railway company, in order to receive consideration by said railroad commission, as appears from the dates and times of the receipt of the said notices by said general freight agent, — was less than ten days. That said commission were requested to extend for ten days the time for hearing prescribed by said notices, which request was refused by said commission. That, although ten days' notice thereof was not given, the general freight agent and other agents of
24 said railway company appeared before said railroad commission, at its rooms in the capitol at Austin, and produced statements, verified by affidavit, showing the unjust, unreasonable and illegal character of said proposed rates. That the said commission did not, as indicated in said notices and communications last referred to, fix rates on said articles, or any rates whatever, at the time and places, or at either of the times or places in said notices specified.

That thereafter the general freight agent of the defendant railway company received from the said commission, through the United

States mails, the several communications, schedules, copies of commodity, tariffs, and circulars, copies of which are filed herewith as part hereof marked "Exhibit C;" that said communications, schedules, copies of commodity tariffs, and circulars were severally so received on or about the day following their respective dates.

That in addition to the communications copies of which are so filed herewith the general freight agent of the defendant railway company and of other railroad companies of Texas have received frequent informal communications from said commission, or from said Chairman Reagan, relating to the tariffs, orders and action of said commission and to the duties, liabilities and action of the railroad companies in respect thereto; and the said general freight agent of the defendant railway company, and the general
25 freight agent of other Texas railroad companies have addressed and sent to the said commission numerous communications, statements and protests relating to action proposed and taken by said commission in the making and announcement of its various tariffs and orders herein complained of. To all of said communications, statements and protests, your orator prays leave to refer with the same effect as if the same were herein set forth.

That said commission has never served, or caused to be served, on the Texas and Pacific Railway Company, any certified copy of its purported tariffs, or either of them, the only pretended service being by mailing to the said general freight agent of mimeograph copies of said tariffs, copies of which are filed herewith and included in said "Exhibit C." Nevertheless, said commission and defendant Culberson, attorney general, and divers other persons are seeking and attempting to force the said railway company to put and continue the same in effect, and threaten and propose to enforce the same through and by the suits, actions and penalties prescribed by said act of April 3, 1891.

That said railroad commission, without further or other notice, or pretended notice, than those hereinabove set forth, are proposing and threatening and proceeding to make and announce other and further schedules of rates and tariffs upon other commodities.

That the said schedules and copies of commodity tariffs,
26 filed herewith as aforesaid, are promulgated by said commission and intended by them as schedules of the rates of charges, for the transportation of the articles named therein, over the Texas and Pacific railway, which rates and charges said commission assumes to establish and fix under the authority purporting to be conferred upon it as such commission by said act of April 3, 1891. And the said commission threatens and intends, under the penalties of the said act, to compel said The Texas and Pacific Railway Company to adopt the said several schedules as rates of charges to be made by it for the transportation of said articles over its railway, and the said The Texas and Pacific Railway Company has adopted the same so far as by the terms thereof they have become effected, and proposes and intends to adopt and, unless

restrained by order of the court, will adopt those still to become effective, as required, or sought to be required by said commission.

Your orator avers that none of the rates promulgated or attempted to be promulgated by said commission, and specified in said schedules, were fixed or attempted to be fixed by said commission at any time or place whereof the said Texas and Pacific Railway Company had ten days' notice or any specific notice whatever, and that the communications from the said commission, and from its chairman hereinbefore referred to constitute the sole and only notice to said Texas and Pacific Railway Company in the premises.

That during the purported hearings before the commis-
27 sion on said proposed tariffs the said Texas and Pacific Railway Company proposed to said commission that if it would grant a reasonable time it would cause estimates to be made showing the movement of each of the commodities upon which it was proposed to make tariffs between stations upon its lines, the rates charged under the then existing tariffs, and the revenue derived therefrom, and showing the revenues which would have been derived if the proposed tariffs of the commission had been applied thereon. Said statement, when furnished to the commission, would not only have shown the effect of said proposed rates, but they could have easily derived therefrom a knowledge and understanding of the effect upon the revenues of said railway company, and other railway companies, of any system of rates they might have under consideration. Said offer was declined by said commission, and they proceeded as aforesaid to establish and announce said schedules, without having secured any reasonable data, statistics of information to enable them even to approximate, with any degree of correctness, the effect of any of the rates considered or established by them.

That at the said sessions of said commission no witnesses were sworn and no evidence introduced, and no formal charges preferred against said Texas and Pacific Railway Company, and any and all persons who desired to be present were allowed to participate in the proceedings. That said commission, although it was fully
28 empowered by law so to do, and was requested by the railway company so to do, failed and refused to appoint experts, or to adopt any other means of investigating the financial condition and the revenues and resources of the said The Texas and Pacific Railway Company, or any other railway companies of the State, and failed to make any effort whatever to inform themselves as to whether the conditions were such as to authorize them to make a reduction in the rates or in the revenues of the railroads in general, or of said Texas and Pacific Railway Company in particular; that at the sessions of said commission, of which the said Texas and Pacific Railway Company, or any other railway companies, were informed, or at which it or they were represented, no evidence whatever was introduced tending to show that the then existing rates of said Texas and Pacific Railway Company, were too high, or were unjust or exorbitant, or yielded greater revenue than said Texas and Pacific Railway Company was entitled to receive. That

the said schedules of rates and charges were so established and promulgated by said commission without any evidence whatever having been taken or adduced before it, which showed or tended to show that said rates and charges were just, fair or reasonable, and the same were so fixed and established notwithstanding that the uncontradicted showing made by the representatives of the railroad companies before said commission tended to show and did show that such rates and charges would be unjust, unfair and unreasonable.

29 Eighth. That the classifications and schedules of rates and charges so announced and promulgated in and by said commodity tariffs and circulars of said commission, or sought so to be, as hereinbefore shown, are unfair, unjust and unreasonable, and that the same cannot be adopted or put or continued in effect by the defendant The Texas and Pacific Railway Company without serious and irreparable loss to it, and serious and irreparable injury to and destruction of the property, rights and interests of your orator and the beneficiaries of its trust as hereinafter more fully set forth; that the rates so charged and announced by said commission are not compensatory and are unreasonably low, and that the adoption and enforcement thereof would result, as nearly as can be estimated, in a diminution of revenues of said defendant railway company from business transacted wholly within the State of Texas, aggregating more than $150,000 per annum; and that the revenues of said railway company, so reduced and diminished, would not only be inadequate to provide for the payment of any interest upon the second-mortgage income bonds secured by said second mortgage to your orator, as trustee, but would be sufficient and inadequate to provide for the fixed prior interest obligations of the Texas and Pacific Railway Company recited and set forth in the fifth paragraph hereof, and at the same time maintain the property in proper order and good working condition, so that the traffic and business of

30 the road and of every part thereof shall at all times be done with safety and expedition.

That the railroad and property of the defendant, The Texas and Pacific Railway Company, upon which your orator has the lien and in which it has the property, rights and interests hereinbefore referred to, have no other or different value or use than as railway property, and as the same are operated in the carriage of persons and commodities for hire; and that the value of your orator's lien thereon and of its property rights and interests therein is determined and fixed by the productiveness and earning capacity thereof. Your orator avers that if the said rates and charges so promulgated and sought to be enforced by said commission shall be adopted and continued in force by the said Texas and Pacific Railway Company, or shall be enforced by any or either of the other defendants hereto, and if the same shall become operative, the result will be the reduction of the value of the railway and property of the defendant The Texas and Pacific Railway Company to the standard of a less than five per cent. investment of a sum less than the indebtedness of said railway company prior and superior to the indebtedness represented by its

said second-mortgage income bonds; thereby eliminating and destroying the value of your orator's property and interests therein, and in effect annulling the investment of the holders of said second-
31 mortgage income bonds secured by said mortgage to your orator as trustee. And your orator fears, apprehends and alleges that the insufficiency of said rates to provide for the interest upon said prior indebtedness would, in such event, result in defaults in the payment of interest thereon and the foreclosure of prior liens; that upon such foreclosure the value of the property and investment having been so fixed and reduced, the said railway and property would not bring, and, by reason of its arbitrarily diminished earning capacity, would not be worth, a sum equal to the charges thereon prior to the mortgage indebtedness represented by your orator as trustee. And so your orator shows that the effect and operation of the said railroad commission act and of the said action of said commissioners in alleged pursuance thereof threaten to deprive your orator and the beneficiaries of its trust of its and their property, rights and interest; and your orator further avers that it and they would be so deprived of said property, rights and interests without due process of law and in violation of the Constitution and laws of the United States and of the constitution and laws of the State of Texas as hereinafter more fully alleged and shown.

Your orator farther avers upon information and belief that the prior mortgage indebtedness hereinbefore recited in paragraph 5th hereof, and the indebtedness to the holders of the bonds se-
32 cured by the said mortgage to your orator and the stock capitalization of the defendant railway company, represent the actual cost to the said railway company of the construction, acquirement and equipment of its lines of railway and property, and the reasonable value thereof, and the capitalization upon which it is entitled to earn, and should pay, full and fair returns by way of interest and dividends. That such returns should be not less than a sum sufficient to provide for the entire interest on its bonded debt, and said railroad commission may not reasonably or lawfully establish rates and charges which will restrict the earnings of said company so that it will be unable to meet these requirements.

Ninth. Your orator avers that each and all of the rates, charges and classifications prescribed by said defendant railway company in force at the time when said commission act was adopted by the legislature of Texas, and when the several tariffs and orders of the commission were promulgated as hereinbefore stated, were in no case unreasonably high; that the same were not in restraint of a free movement of all commodities affected thereby; that the same were far less than the rates and charges for like transportation of like articles prior to the construction of the lines of railway of the defendant company, and that the same were not and are not sufficient to enable the said defendant company to pay the interest upon its bonds. Wherefore your orator avers that a reduc-
33 tion of said rates and the establishment of any reduced rates are and would be unjust and unreasonable and in effect a confiscation and appropriation to the use of others of a portion of the capital invested by the beneficiaries of your orator's trust, and

by other persons, in the railroad and securities of the defendant company, and a taking of the property of said company, and of your orator, and the beneficiaries of its trust without due process of law, and not in due course of law, and without adequate compensation being made, contrary to, and in violation of section 1 of article 14 of the amendments to the Constitution of the United States, and sections 17 and 19 of article 1 of the constitution of the State of Texas of the year 1876.

Your orator further avers that its rates, charges and classifications were fixed and established by defendant company with a careful regard for the financial, commercial and competitive conditions and laws which enter into, affect or control the making and relative adjustment of rates and classifications in the State of Texas, and yet that said railway company during the year 1890, earned the net sum of $1,467,005.05 from the operation of its railways and no more, as is more fully set forth and explained in detail in the tenth paragraph of this bill of complaint, and that said net earnings less the amount paid for necessary equipment, betterments and replacements would suffice only to pay interest at
34 the rate of six per cent. on $12,595 per mile, or five per cent. on $15,114 per mile of the railways owned and operated by said defendant company, and were totally inadequate to provide for its entire interest, and fell short $1,405,940.68, to provide the amount required to pay the interest on the entire bonded indebtedness of said railway company.

Tenth. Your orator avers that the following is a tabular statement of the transportation receipts and expenses of the Texas and Pacific Railway for the years 1889 and 1890:

Transportation Receipts.

	1890.	1889.
Passenger receipts	$1,894,176 56	$1,675,473 78
Freight receipts	5,024,968 86	4,853,630 04
Express receipts	146,687 05	150,000 00
Mail receipts	203,913 75	194,824 12
Miscellaneous receipts	57,964 05	43,874 90
Total	$7,327,710 27	$6,917,802 84
Receipts per mile operated	$4,888 40	$4,621 11
Total transportation receipts for year 1890	$7,327,710 27	

Transportation Expenses.

Conducting transportation	$2,170,914 44	$1,824,772 57
Motive power	1,606,929 88	1,513,241 42
Maintenance of way	1,379,715 59	1,241,598 07
Maintenance of cars	291,070 07	283,513 65
General expenses	223,714 49	209,716 39
Total	$5,672,344 47	$5,072,842 10

	Expenses per mile operated	$3,784 09	$3,388 74
35	Total transportation expenses for year 1890, 77.41 per cent	$5,672,344 47	
	Balance	$1,655,365 80	
	Taxes paid	188,360 75	
	Net earnings from operation	$1,467,005 05	
	Per cent. of operating expenses, including taxes	79.98	

Income Account Texas and Pacific Railway Company, Dec. 31, 1890.

CREDIT.

By balance reserved for betterments Dec. 31, 1889		$287,334 32
By earnings, 1890:		
From freight	$5,024,968 86	
From passengers	1,894,176 56	
From mail, express and miscellaneous	408,564 85	
By other income (rentals, etc.)	151,156 13	
		7,478,866 40
Total		$7,766,200 72

DEBIT.

To expenses:		
Transportation	$5,672,344 47	
Taxes	188,360 75	
Interest and discount	20,704 64	
Total	5,881,409 86	
To rentals	68,904 00	
To interest on bonds	1,279,490 00	
To new equipment	172,783 50	
To car trust, series B, due Dec. 31, 1890	131,000 00	
To real estate, terminal property	86,600 00	
To new boats and barges	2,400 00	
To new hospital	2,969 72	
To balance to credit of income, Dec. 31, 1890	146,643 64	
		7,766,200 72

	Revenue per ton per mile for 1890	01 26
	Revenue per ton per mile for 1889	01 34
	Decrease	00 08
36	Revenue for cotton originating in Texas twelve months ending Dec. 31, 1890	$645,959 98
	Per cent. of cotton revenue to total	12 85
	Revenue from lumber originating in Texas twelve months ending May 31, 1891	464,708 09
	Per cent. of lumber revenue to total	09 61
	Revenue from salt originating in Texas twelve months ending May 31, 1891	26,453 94
	Per cent. of salt revenue to total	00 55
	Revenue from grain originating in Texas twelve months ending May 31, 1891	20,781 83
	Per cent. of grain revenue to total	00 43

It appears from the foregoing statement, and the fact is, that the revenue per ton per mile derived from the traffic handled by the defendant railway company in the year 1890 was $.0126 per mile, as against $.0134 per mile in the year 1889, to wit: a decrease of $.0008. That said revenue per ton per mile in the year 1890 was the lowest ever derived by the said railway company in the operation of its property, and difference of $.0008 per ton per mile involved a loss of revenue of $319,000, or over 19 per cent.

Your orator avers that the following is a tabular statement of the revenue per ton per mile derived from the operation of the Texas and Pacific railway during the years 1875 to 1890, inclusive, (with the exception of the year 1882, for which year the data is not obtainable), viz:

37	1875	$.05[13]		1884	$.01[64]
	1876	.03[97]		1885	.01[56]
	1877	.03[34]		1886	.01[67]
	1878	.03[25]		1887	.01[46]
	1879	.03[12]		1888	.01[36]
	1880	.03[09]		1889	.01[34]
	1881	.02[61]		1890	.01[26]
	1883	.01[76]			

And your orator avers that it appears from said statements, and the fact is, that any further reduction of the rates and charges of the Texas and Pacific Railway Company, involving a further reduction of the revenue thereof, will have the effect hereinbefore stated.

Your orator avers that there will be no compensatory increase in the business and tonnage of the said defendant railway company resulting from the reduced rates established by said commission or otherwise; and that, as your orator is informed and believes, there will be no appreciable or substantial increase whatever in such business or tonnage.

Eleventh. Your orator further alleges that the injurious and destructive effect of the establishment of said unjust and unreasona-

bly low rates, would not be limited to the business of the defendant railway company transacted within the limits of the State of Texas; but said rates would affect the interstate business of the railway company and impair and diminish the revenues derived therefrom. In this behalf your orator avers that all interstate rates, in which the defendant railway company and other railway
38 companies of Texas participate, are based upon the rates prevailing between Galveston and interior points in the said State of Texas. That the interstate rates are controlled and determined by water competition; that is, the water rates between foreign or Atlantic seaboard points and Galveston, added to the local rate between Galveston and interior Texas points of origin or destination of shipment, make the rate which the interstate lines are compelled to meet or adopt. So that your orator shows that a corresponding decrease of interstate rates would ensue the reductions of intrastate rates required by the schedules heretofore announced by the commission. These conditions affect substantially all classes of shipments which are handled by the defendant railway company, and your orator is informed and believes, and therefore avers, that the reduction of revenues from interstate business, which would be caused by the adoption and enforcement of said schedules, would reach a sum in excess of $100,000.

In this behalf your orator avers, by way of instance and illustration, that the reduction of annual revenues from the application of the commission's tariff to the transportation of lumber and shingles alone, carried from mills on the line of the said railway in Louisiana, would, as your orator is informed and believes, reach a sum in excess of $18,000. That this result is reached by a careful application of said commission's tariff to the actual tonnage of lum-
39 ber and shingles carried during the year 1890 between the points mentioned.

Twelfth. Your orator further avers, that by an order, rule, rate and regulation made and established by said commission on the 6th day of November, 1891, and promulgated, published and designated by it as circular No. 34, a copy whereof is filed herewith as part hereof, included in said Exhibit "C" to this bill, said commission requires and commands, and unless restrained by this court will compel the defendant railway company upon the demand of the owner of any freight or property contained in any car owned by said railway company or in its possession, to surrender and deliver its said car containing said freight or property to any railway company designated by said owner with which the railway of defendant company connects, to be used by such other railway company upon its own lines and its connections, in the transportation of said property to any place off the line of defendant company's railway designated by the owner of said freight. That under the terms of said order, rule and rate, the cars of the defendant company may be taken from its possession and used as above stated without the consent of the defendant railway company, and without adequate compensation, and without other compensation for the use thereof by such shipper or other railway company while off

said defendant company's line and out of its possession than
40 a rental fixed by the said commission during the period of such enforced bailment, and without any security for the safe or prompt return of said car or indemnity against damage or injury which may be done thereto.

That by said order, rate, rule and regulation, said commission also requires and commands, and unless restrained by this court will compel the defendant railway company under pain of the penalties by said act prescribed upon the tender of any car containing freight or property for transportation and demand of the owner of such freight or property, or upon the demand of any railway company having such car in its possession, to receive the same for transportation to any point on or beyond its own line which the owner of such freight or property may designate, and to pay to the railway company or person or corporation owning the car a mileage rate for every mile which said car may, under the direction of the owner of the freight therein, or of the said railway company tendering said car, be hauled over the Texas and Pacific railway as aforesaid, although said defendant company owns and possesses a large number of cars for the transportation of property received by it as a common carrier, and has, except during rare seasons of extraordinary business activity, a sufficient number of idle cars available for such use. After such car has been transported to the point designated by the owner of the freight contained therein,
41 the defendant company is by said order, rate and rule, required to again haul said car over its railway and redeliver it to the company from which it was received without any compensation whatever for such carriage and service.

That said order, rate and rule also requires said railway company to perform any necessary switching service in receiving from, or delivering to any connecting railway line any such car, without compensation or reward.

That in the respect above recited, the defendant railway company is, and would be by said order, rate and rule, deprived of its property without due process of law, and not in due course of law contrary to section 1 of article 14 of the amendments of the Constitution of the United States, and of sections 17 and 19 of article 1 of the constitution of the State of Texas.

That the effect and operation, and as your orator is informed and verily believes, the purpose of said order, rate and regulation, is among other things the regulation of commerce between the State of Texas and other States and foreign countries, and the regulation of the rates of transportation of shipments of an interstate character, by permitting the interruption of such commerce and shipments at points within the State of Texas in such a way that a point intermediate between the real points of origin and destination of the shipments may be fixed as point of temporary destination,
42 and the shipment rebilled from the latter point to its actual and final destination; the shipment in the State of Texas, between this temporary point and the actual and real point of origin or destination, taking the rate established by the said com-

mission and not the through interstate rate established under and in accordance with the Constitution and laws of the United States.

In this respect your orator shows, that said order, rate and rule so announced and published as said circular No. 34, and said act of the legislature of the State of Texas purporting to confer upon said railroad commission power and authority to make, announce and enforce said order, rate and rule, are invalid and void because in conflict with and in violation of section 8 of article 1 of the Constitution of the United States, and an act of Congress of the United States, entitled "An act to regulate commerce," approved February 4th, 1887, and the amendments thereto.

Thirteenth. Your orator shows that the defendant railway company was chartered by act of Congress of the United States, as aforesaid, for the purpose of building, acquiring and operating lines of interstate railway, as an agency and instrumentality of interstate commerce and business, and with power and lawful capacity to regulate its own business, including its rates and charges for transportation, in any manner not inconsistent with the laws of the United States and the provisions of its charter; and your orator shows that the only condition and limitation
43 upon and of the right and lawful authority of the said railway company to fix and regulate said charges for transportation upon its own lines of railway are that said railway company is, by its said charter, prohibited from charging greater rates per mile for carrying passengers and freight than the prices which might be fixed by Congress for carrying passengers and freight on the Union Pacific and Central Pacific railroads.

Your orator therefore avers that it was not and is not competent for the legislature of the State of Texas, either by direct legislation or through the acts of any agency or instrumentality by it created, to fix and prescribe schedules of rates and classifications, regulating the business of said railway company; and that said commission was and is without power or lawful authority, and could not derive power or lawful authority from said act of April 3, 1891, or from any act of the legislature of the State of Texas, to fix or prescribe rates, charges or classifications for said railway company, or to regulate the same, in the manner proposed and attempted in and by the schedules adopted and promulgated by said commission, as hereinbefore set forth. And your orator says that said *that* act of the legislature of the State of Texas, in so far as it purports or is intended to affect the defendant railway company in the respects above recited, is inoperative, and void, and that likewise inoperative and void are any acts, schedules, orders or
44 regulations of said railroad commission in so far as they purport or are intended in like manner to affect said railway company or its business; for, as your orator avers and submits, said act, acts, schedules, orders and regulations would operate to deprive said railway company of right conferred upon and vested in it by the act of the Congress of the United States constituting its charter, and are, therefore, contrary to the Constitution and laws, and to said last-mentioned law, of the United States.

You orator further alleges that in and by said act of Congress of March 3, 1871, incorporating the defendant railway company, it is provided, among other things, as follows:

SECTION 19. That the Texas Pacific Railroad Company shall be, and it is hereby declared to be a military and post road, and for the purpose of insuring the carrying the mails, troops, munitions of war, supplies and stores of the United States; no act of the company nor any law of any State or Territory shall impede, delay or prevent the said company from performing its obligations to the United States in that regard.

Your orator avers that in the event of the adoption and enforcement of said unreasonably low rates prescribed by said commission, the defendant, the railway company, will be unable to pay interest upon its said fixed mortgage indebtedness, and to keep and maintain its railroad and equipment in such condition and repair as to enable it to properly perform its said charter obligations and
45 to maintain a due and proper standard of safety and efficiency in the operation of its said railroad and property.

That the mortgage bonds and stock made and issued by the defendant railway company, as hereinbefore recited, were so made and issued lawfully and in pursuance of power and authority conferred upon said railway company in and by said act of Congress of the United States of March 3d, 1871, and acts of Congress supplemental thereto and amendatory thereof, constituting the charter of the said defendant railway company; that it was not and is not competent or lawful for the legislature of the State of Texas, directly or through any instrumentality or agency by it created, to fix and establish such rates, charges and regulations affecting and controlling the transportation and business of the said railway company as will so impair and reduce its revenues that it will be unable to earn the interest upon its said bonds so made and issued as aforesaid; and your orator avers that such legislative action of the State of Texas is and would be invalid and void because violative of the rights of the said railway company, of your orator and of the beneficiaries of your orator's said trust, secured to and conferred upon it and them under and by said acts of Congress of the United States.

Fourteenth. Your orator further shows that in section 5 of said act of the legislature of Texas establishing the said railroad
46 commission it is provided that in all actions between private parties and railway companies brought under said law, the rates, charges, orders, rules, regulations, and classifications prescribed by said commission before the institution of such action shall be held conclusive and deemed and accepted to be reasonable, fair and just, and in such respects shall not be controverted therein until finally found otherwise in a direct action brought for that purpose in the manner prescribed by sections 6 and 7 of said act. So that your orator alleges that unless the relief herein sought be granted the failure of the Texas and Pacific Railway Company to adopt and put into effect and use the unreasonably low and uncompensatory rates heretofore prescribed by said commission would sub-

ject it to a multiplicity of suits brought by shippers for the penalties provided in section 17 of said act; and that in such action the said railway company would be deprived of the lawful defense that the rates and charges so prescribed by said commission were and are unreasonable; and the said railway company, so concluded and deprived of lawful defense, would be subjected to innumerable penalties, ranging from $125 to $500, in each case, and would be thereby deprived of its property without due process of law, and in a proceeding wherein its liability was fixed in advance, contrary to the Constitution and laws of the United States and to the constitution and laws of the State of Texas. Your orator furthermore alleges that in such suits by individual shippers the said railway
47 company would be deprived of the right to a trial by jury of the issue involved in the said lawful defense, that said rates and charges were and are unreasonable, and that such deprivation of said right is and would be contrary to section 15, article 1 of the constitution of the State of Texas.

Your orator avers that section 6 of said act provides, that any railroad company or other party at interest, dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the commission, may file a petition setting forth the particular cause or causes of objection to such decision, rule, etc., in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant; and section 7 provides, that in all trials under section 6 the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to them. Said sections 6 and 7 provide the only contingency (except in suits on behalf of the State for penalties) in which railway companies may contest or controvert the reasonableness of a rate announced by the commission, and the effect of said act (except as to such suits on behalf of the State), is to withdraw wholly from all railway companies subject to the operation of the act, including the railway company defendant herein, the right to make the defense that any charges, reg-
48 ulations or classifications of the commission are unreasonable, and (with said exception) limits the making of that issue to an affirmative proceeding directly instituted for that purpose in a single local court, wherein the burden of proof is fixed as above recited; and the effect of said act is to deprive railway companies subject to the operation thereof of the right to make a lawful defense under and subject to settled rules of evidence in any proceeding which may be instituted by individuals against it, thereby taking the property of said railway companies without due process of law, and denying to them the equal protection of the laws, contrary to the Constitution and laws of the United States and especially section 1 of article 14 of the amendments to said Constitution, and to the constitution and laws of the State of Texas, and especially to sections 17 and 19, of article one of said constitution of Texas.

Your orator further alleges that the defense that any rate or charge is unreasonable cannot, under the provisions of said act, be

made in any such suit by individuals until said court of Travis county has found that such rate or charge is not reasonable, fair or just, and the effect of said act in this respect is that upon such finding by the Travis county court the defense that such rate is unreasonable, unfair or unjust may only thereafter be made in suits instituted by individual shippers, so that, as your orator shows, the operation of said act is to deny the right to make such de-
49 fense in such suits by individual shippers until there has been an adjudication upon such issue in a suit between other parties in the tribunal of Travis county, and thus the practical effect of said act is to deny the right of railway companies to make a lawful defense pending the institution by said railway companies, in a different tribunal and against other parties, of a suit for the purpose of directly making the issue involved in said defense and of making such issue under the adverse conditions and the extraordinary and arbitrary presumptions and rules of evidence established by section 7 of said act. In the meantime innumerable judgments may be recovered in suits by individuals, and said act provides no relief against such judgments, notwithstanding the said tribunal of Travis county may subsequently declare the rates and charges for the violation of which said judgments of individuals may have been procured, were unfair, unreasonable and unjust.

Moreover, your orator, as it is advised and believes, alleges that the right pretended to be conferred by said act of contesting in a court of competent jurisdiction of Travis county, the reasonableness, fairness or justness of any rate, charge, or act of the said commission, is without effect and without value to the railway companies or persons interested in the railways, properties subject to the operation of said act; for as your orator is further advised and alleges, under the constitution of the State of Texas estab-
50 lishing the judicial system of said State and defining the jurisdiction of the several courts, there exists in Travis county no court of competent jurisdiction in the premises. And in this behalf your orator further alleges that the constitution of the State of Texas (article V) prescribes a complete judicial system for said State, and the legislature of the State of Texas is without power or authority to add to or take from the jurisdiction of the several courts of said State as defined by said constitution, or to create or constitute any court or judicial tribunal, or to invest any court created under and by virtue of the constitution of the State of Texas, or any body or tribunal constituted by legislative act, with any judicial powers or jurisdiction whatever. And your orator avers that under the limitations of jurisdiction prescribed by the said constitution of the State of Texas, the courts of Travis county, in said State, and each and all of them, are wholly without jurisdiction and judicial power to entertain the petition of any railroad company or other party dissatisfied with the decision of rates, charges, etc., as provided in section 6 of said act of April 3d, 1891, and said courts and each and all of them are without jurisdiction and judicial power to determine or adjudicate any of the matters

purporting to be committed to them or either of them by said sections 6 and 7 of said act.

Your orator shows that, even if it should be held that a court of Travis county would have jurisdiction of such an action, the remedy provided thereby would be wholly inadequate, if, pending
51 the litigation, the tariffs of said commission should be enforced as provided in said act. And your orator shows that, under the practice of the State of Texas, the trial of such an action and appeal therein may be extended over a long period of time, and that a final and conclusive adjudication upon the reasonableness and justness of rates may not be obtained in a less time than one year from the institution of such an action, during which time the defendant railway company and your orator and the beneficiaries of its said trust, would suffer great and irreparable loss and injury under the enforcement of said tariffs, inasmuch as no provision is made in and by said act for restitution in the event that it shall be finally held that the tariffs of said commission or any of them are unjust and unreasonable.

Fifteenth. Your orator further avers that the penalties denounced by said act of April 3, 1891, for failure to comply with any of the provisions thereof, or with any of the rules, regulations, charges or rates prescribed and fixed by said commission, are wholly immoderate, unreasonable and excessive, and bear no just relation to the causes or matters with respect to which they are denounced; and that said excessive penalties are, as your orator verily believes, prescribed by said act with the view and intention that the same shall operate as a threat and menace to the defendant railway company, and to other railway companies, subject to the operation of said act, to the end that they may be thereby compelled and coerced
52 into the adoption of the rates and charges prescribed by said commission, whether or not the same shall be reasonable, fair and just. That the enforcement of the multiplied and excessive penalties prescribed by said act would result in serious loss and damage and possible bankruptcy to railway companies subjected thereto; and the operation of said act in this respect is harsh, unreasonable and confiscatory; and your orator avers that said act constituting said railroad commission is, in this respect, contrary to and in violation of the constitution of the State of Texas.

Sixteenth. Your orator avers that unless immediate relief is granted, the tariffs of said commission will cause a serious and very large reduction in the earnings and revenue of said railway company, which will be irretrievably lost to it, and that such loss will be daily sustained until such relief is granted.

In conclusion, your orator alleges that it has requested the defendant railway company to refuse to recognize, adopt or enforce the unfair and unreasonable rates prescribed in said schedules; but said railway company has declined to so refuse, and has adopted said rates so far as the same have been declared effective by
53 said commission, and intends and proposes to adopt any rates already announced, but not yet effective under the terms of said schedules, and to put the same in force and effect

upon the ground that under said act of April 3, 1891, it would otherwise be defenseless against the multiplied penalties recoverable at the suits of individual shippers and the additional penalties recoverable in actions instituted by the defendant Culberson, said company fearing that the consequences of such refusal might thus be even more disastrous and ruinous than the operation and effect of said unreasonable rates. Your orator further alleges that it has been requested by the holders of more than one million dollars in amount of said second-mortgage income bonds of said railway company to bring this its bill of complaint for the relief herein sought, and that its action in this behalf is taken in response to and in compliance with said request.

Your orator avers that it was and is duly authorized and empowered by law, and its charter to accept and administer its trust herein stated, as trustee of the second mortgage of the defendant railway company, and to take the action and sue for the relief herein stated and sought.

Your orator shows that this cause is a suit in equity of a civil nature, and that the matter in dispute exceeds exclusive of interest and costs the sum or value of five thousand dollars, and that this cause is a suit arising under the Constitution and laws of the United States, to wit: Under section 10 of article 2 of the
54 Constitution, and under section 1 of article 14 of the amendments to the Constitution, and under the act of Congress of the United States approved March 3d, 1871, and acts of Congress supplemental thereto and amendatory thereof, constituting the charter of the defendant railway company; and that in this cause and suit there is a controversy between citizens of different States in which the matter in dispute exceeds exclusive of interest and costs the sum or value aforesaid.

In consideration whereof and forasmuch as your orator is remediless in the premises under the rules of common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable; to the end therefore that the defendants hereinafter named may answer the several matters and things hereinbefore set forth, as fully and particularly as if the same were herein again repeated, and they were thereto interrogated, and that an injunction may issue out of this court restraining and enjoining the said The Texas and Pacific Railway Company from putting or continuing in effect the tariffs, circulars, or orders of the said commission, or either or any of them herein described, and from charging or continuing to charge the rates specified in said tariffs, circulars, or orders or either or any of them, and restraining the said Reagan, McLean, and Foster and the said Charles A. Culberson, and each of them, from instituting or authorizing or directing any others to institute any suit or suits, action or actions against the railway company for the recovery of any
55 penalties under and by virtue of any of the provisions of the said commission law, and restraining all other individuals, persons or corporations now or hereafter claiming any right under and by virtue of the said commission law or said tariffs or

either of them or both combined, or under and by virtue of the said tariffs or orders of the said commission, or either of them, from claiming or instituting suit or suits against the railway company for the recovery of any damages, overcharges, penalty or penalties under or by virtue of said commission law or any of its provisions or under and by virtue of the said tariffs, orders or circulars of the said commission or any or either of them, or under and by virtue of the said commission law and the said tariffs, orders or circulars or any or either of them combined, and restraining the said commissioners, and each of them, from making, issuing or delivering to the railway company or causing to be delivered to it, any further tariff or tariffs, circulars or orders, and that in the meantime until the hearing hereof your orator may have a temporary restraining order embracing all of the relief herein prayed for, such restraining order to continue in force until the termination of the hearing for a writ of injunction, and that on final hearing of this cause it may have all injunctions herein prayed made perpetual, and that all tariffs, circulars and orders heretofore made and issued by said commission, and each of them, may be cancelled and declared to be null, void and of no effect by decree of this court, and that a
56 mandatory injunction may be issued to the said commissioners, and each of them, commanding them to recall and abolish the said tariffs, circulars and orders, and each of them, and that your orator may have such further and other relief as this case may require, as well as all costs: May it please your honors to grant unto your honors a writ or writs of subpœna to be issued out of and under the seal of this honorable court and directed to the said defendants, The Texas and Pacific Railway Company, John H. Reagan, L. L. Foster and William P. McLean and Charles A. Culberson, commanding said defendants and each of them to appear in this court at some certain day to be therein named, and to answer the premises, but not under oath (answer under oath being expressly waived), and abide by and perform such decree as may be rendered herein.

[L. S.] THE MERCANTILE TRUST COMPANY,
By LOUIS FITZGERALD, *President.*
FARRAR, JONAS & KRUTTSCHNITT,
ALEXANDER AND GREEN,
WEST & McGOWN, *Complainant's Solicitors.*

JOHN F. DILLON,
JOHN J. McCOOK,
E. B. KRUTTSCHNITT,
Of Counsel.

57 STATE, CITY AND COUNTY OF NEW YORK, *ss.:*

Louis Fitzgerald, being duly sworn, says that he is the president of The Mercantile Trust Company, the plaintiff above named, and has been such president for a number of years past; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the

matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; and further, that the seal affixed to the said bill is the corporate seal of the complainant, and was affixed by him to said bill by authority of said complainant.

LOUIS FITZGERALD.

Sworn to and subscribed before me this 5th day of April, 1892.

WM. J. HARDING,

[L. S.] *Notary Public, Kings and New York Counties.*

58 THE MERCANTILE TRUST CO., Trustee, } No. 186. Equity.
v.
THE T. & P. R'Y CO., J. H. REAGAN, *et als.*

"A."

Second Mortgage, The Texas and Pacific Railway Company to The Mercantile Trust Company of New York, Dated February 1st, 1888.

Filed Ap'l 30, '92. B. G. Duval, clerk, by D. H. Hart, d'y.

59 This indenture, made this first day of February, in the year one thousand eight hundred and eighty-eight, between the Texas and Pacific Railway Company, a corporation created by and existing under the laws of the United States of America, and of the States of Louisiana and Texas, hereinafter termed the railway company, and the New Orleans Pacific Railway Company, a corporation created by the laws of the State of Louisiana, parties of the first part, and the Mercantile Trust Company of New York, a corporation existing under the laws of the State of New York, hereinafter termed the trustee, party of the second part.

Whereas, the Texas Pacific Railroad Company was, by its charter, approved by the President of the United States, March 3d, 1871, authorized and empowered to build a line of railway, complete in all its parts, from a point at or near Marshall, in the county of Harrison, State of Texas, westerly to a point at or near El Paso, thence through the Territories of New Mexico and Arizona, and the State of California, to ships channel in the Bay of San Diego; and by its charter, and other congressional and legislative acts, was duly authorized and empowered to unite and consolidate with certain other railroad companies, and acquire all their rights, franchises and property; and in pursuance of that power did purchase the property and franchises of the Southern Pacific Railroad Company of Texas, by deed dated March 21st, 1872, and did also purchase the rights, franchises, and property of the Southern Transcontinental Railway Company, by deed dated March 30th, 1872, and did also acquire as lessee a leasehold interest in the line of the Vicksburg, Shreveport and Texas Railroad Company, extending from Shreveport, in the State of Louisiana, to a connection with the line of railroad of the Texas and Pacific Railway Company, the
60 State line between Louisiana and Texas; and did also purchase and acquire from the New Orleans Pacific Railway

Company, by articles of consolidation and conveyance, made the twentieth day of June, 1881, the franchises, corporate rights and privileges, and the track, road-bed, buildings, rolling stock, engines, tools, privileges, and property, real and personal, of the New Orleans Pacific Railway Company, except the land and land grants acquired by said New Orleans Pacific Railway Company from the Government of the United States, either directly or through the New Orleans, Baton Rouge and Vicksburg Railroad Company; it being provided, however, that the franchise of the New Orleans Pacific Railway Company to be and remain a corporation was not impaired by anything contained in said articles of consolidation and conveyance.

And the said New Orleans Pacific Railway Company unites in the execution of this indenture for the purpose of remising, releasing, and conveying to the said trustee whatever rights, interest, or estate, if any, may remain in the said company, in, to, or of the mortgaged premises hereinafter described or any part thereof, to the end of investing the said trustee upon the trusts of this indenture with whatever right, title, or estate may remain, if any, in the said New Orleans Pacific Railway Company in or to the said premises herein mortgaged;

And whereas, the Congress of the United States passed an act, of date May 2d, 1872, by which the name and title of said company was changed to that of the Texas and Pacific Railway Company;

And whereas, other rights, privileges, and powers were granted and conferred by the acts of Congress of March 3d, 1873, and June 22d, 1874, and by virtue of said acts of incorporation and such other legislation amendatory thereof and supplementary thereto the execution of this mortgage and issue of the bonds intended to be secured thereby is fully authorized;

61 And whereas, the said Texas and Pacific Railway Company has heretofore constructed and is now the owner of the lines of railway, with the appurtenances, hereinafter described;

And whereas, the Texas and Pacific Railway Company has also acquired, as aforesaid, the road constructed by and formerly belonging to the New Orleans Pacific Railway Company, extending from Shreveport aforesaid to the town of Gouldsboro, opposite the city of New Orleans, in the State of Louisiana, including a branch to Baton Rouge, a distance from Shreveport to Gouldsboro, including said branch, of three hundred and thirty-six (336) miles;

And whereas, the Texas and Pacific Railway Company has acquired the terminal properties hereinafter described in Gouldsboro and New Orleans, as well as other properties also so described;

And whereas, at a meeting of the board of Directors of the Texas and Pacific Railway Company, held on the third day of January, 1888, the following preamble and resolutions were adopted:

Whereas, for the purpose of retiring and adjusting the present mortgage indebtedness of the Texas and Pacific Railway Company in accordance with the terms of a plan of reorganization of the company as set forth in a certain agreement bearing date August 13th, 1886, between Isaac J. Wistar and others, a committee of the bond-

holders and stockholders of the Texas and Pacific Railway Company, and the stockholders, bondholders, and creditors of the company, it is necessary to make an issue of mortgage bonds, one of which to be an amount not exceeding $25,000,000, to be secured by a second mortgage upon all and singular the railroad property and franchises of the company, which shall be used to settle with other creditors of the said company, as stipulated in the said agreement and its amendments:

62 Resolved, That the president or vice-president and secretary of this company be and they are hereby authorized and directed to execute under the common seal of this company, its bonds to the amount of twenty-five million dollars, in form substantially as follows:

No. —. $1,000.

UNITED STATES OF AMERICA, }
States of Louisiana and Texas. }

The Texas and Pacific Railway Company second-mortgage income bond.

The Texas and Pacific Railway Company, a consolidated corporation existing under the laws of the United States and of the States of Louisiana and Texas, acknowledges itself to be indebted unto the bearer or after registration to the registered holder hereof in the sum of one thousand dollars ($1,000) in gold coin of the United States of the present standard of weight and fineness, which sum the railway company promises to pay the bearer or registered holder in case of registration on the first day of December, A. D. 2,000, at its office or agency in the city of New York, and to pay interest thereon out of the net income of the railway company as the same may be determined by its board of directors, at the rate of five per cent. per annum from December 1st, 1887, in like gold coin, at the said office or agency; payable annually on the first day of March following, on the surrender of the annexed coupons: Provided, however, that interest hereon shall be payable to the extent only that such net income, if any, permits, and that interest hereon shall be non-cumulative.

On and after March 1st, 1892, the trustee of the mortgage securing this bond, in case of non-payment of full interest at five per cent. per annum, shall, on request of the holders of not less than one-third of the bonds outstanding, enter into possession of
63 the mortgaged property and manage the same under the direction of a committee appointed by a majority of the bondholders, until payment of interest in full. All payments both of principal and interest shall be made without deduction of any taxes which the railway company may be required to pay or to retain therefrom by any present or future law of either of the said States or of the United States, the railway company hereby agreeing to pay all such taxes.

This bond is one of a series of bonds of like tenor and amount

numbered from 1 to 25,000, both inclusive, and all equally secured by and subject to the terms and conditions of a second mortgage, to which reference is hereby made, bearing even date herewith, executed and delivered by the said railway company, to the Mercantile Trust Company of New York, as trustee, for the holders of said bonds, conveying its railroad franchises and certain other property therein more particularly described, subject to a first mortgage bearing even date herewith, to which reference is hereby made, given by the said railway company to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, as trustee, to secure an issue of bonds to the amount of $25,000,000.

This bond may be registered on the books of the said railway company, and after a registration of ownership shall be certified hereon by the transfer agent of the company no transfer will be valid unless made upon the books, but the transfer may be made to bearer, which will restore transferability by delivery, and successive registrations to a party named or to bearer at the option of each owner may be made. And upon registration the owner may at his option surrender all the unpaid coupons hereto annexed, which will thereupon be permanently cancelled and thereafter interest will be paid only to the registered owner, or to his authorized attorney, but until the coupons are surrendered they
64 will continue to be payable and will be paid to the bearer thereof, although the bond may have been registered. This bond shall not become obligatory until authenticated by the trustee's certificate properly executed.

In witness whereof, the Texas and Pacific Railway Company has caused its corporate seal to be hereunto affixed and the same to be attested by the signatures of its president and secretary, on the first day of February, A. D. one thousand eight hundred and eighty-eight.

—— ——, *President.*
—— ——, *Secretary.*

On the first day of March, A. D. —, the Texas and Pacific Railway Company will pay to bearer, at its agency in New York, in gold coin, such portions of its net earnings, if any, not exceeding fifty dollars, as shall, in accordance with the mortgage securing the same, be then applicable to the payment of interest on its second-mortgage bond No. —. If there be no net earnings applicable thereto, this coupon will then become void.

——, *Treasurer.*

Trustee's Certificate.

The Mercantile Trust Company hereby certifies that this is one of a series of bonds issued under the terms of a mortgage of the Texas and Pacific Railway Company, bearing even date therewith, and therein more particularly referred to.

THE MERCANTILE TRUST COMPANY,
By —— ——, *President.*

65 Resolved also, That to secure the payment of said bonds, the president or vice-president and secretary of this company execute a mortgage of all the property and franchises of the company in form now presented, and approved.

And whereas, at a meeting of the board of directors of the New Orleans Pacific Railway Company the execution of this mortgage was duly authorized;

And whereas, the Texas and Pacific Railway Company, in pursuance of said resolution and of all and every legal power and authority in them vested, propose to make, execute, and issue bonds secured hereby, in the manner heretofore mentioned, amounting in the aggregate to twenty-five million dollars:

Now, therefore, this indenture witnesseth, that the Texas and Pacific Railway Company and the New Orleans Pacific Railway Company, parties of the first part, for and in consideration of the premises and the sum of one dollar ($1) to them duly paid by the said trustee party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in order to secure equally the payment of the principal and interest of the bonds aforesaid at any time outstanding, have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, assigned, transferred and set over, and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm, assign, transfer and set over, and do hereby mortgage, hypothecate, and affect unto the said trustee party hereto of the second part, and its successors and assigns, all and singular the railroads, property, franchises, rights, and privileges of the railway companies; which are more particularly described as follows, viz:

All of the Texas and Pacific Railway Company's line of railway, extending from a point on the State line between the States
66 of Louisiana and Texas westwardly to Marshall and from Marshall by way of Dallas to Fort Worth, in the State of Texas; and from Texarkana on the State line between Texas and Arkansas, to its junction via Clarksville, Paris, Bonham, Sherman, and Whitesboro' with the main line aforesaid at Fort Worth; and from Marshall aforesaid through the town of Jefferson to its junction at or near Texarkana, with the said line from Texarkana to Fort Worth; and from Fort Worth aforesaid to a junction with the Southern Pacific railway at Sierra Blanca, at which point it unites and connects with the Galveston, Harrisburg and San Antonio railroad. Also the right of joint use of the road of the Galveston, Harrisburg and San Antonio Railroad Company between Sierra Blanca aforesaid and El Paso, a distance of about ninety miles; and also the right of way and partially constructed line of railroad from Sierra Blanca to El Paso, subject to the right however to issue bonds at the rate of ten thousand dollars a mile on said line from Sierra Blanca to El Paso, for the purpose of completing the same, and to secure the said bonds by a first mortgage which shall be prior in lien to this present instrument. Upon said line from Sierra Blanca to El Paso, and also its leasehold interest in the line of railroad of the Vicksburg, Shreveport and Texas rail-

road, extending from Shreveport, in the State of Louisiana, to a connection with the main line of railroad of the Texas and Pacific Railway Company at the State line between Louisiana and Texas, being a total mileage of about eleven hundred and fifty miles; and also the road whether acquired or constructed by and formerly belonging to the New Orleans Pacific Railway Company, now the property of the Texas and Pacific Railway Company, extending from Shreveport aforesaid to the town of Gouldsboro', opposite the city of New Orleans, in the State of Louisiana, including a branch to Baton Rouge, said last-mentioned road from Shreveport to Gouldsboro', including said branch, being about three
67 hundred and thirty-six (336) miles, and which includes the railway and railway property acquired from Morgan's Louisiana and Texas Railroad and Steamship Company by deed of February 16th, 1881, hereinafter mentioned; also all appurtenant lands acquired and all existing tracks, extensions, and connections, including all additions, extensions and improvements constructed during the receivership under the proceedings instituted in the circuit court of the United States for the fifth circuit; also the right, title, and interest of the said railway company of, in and to the Gordon coal mine and lands connected therewith in Palo Pinto county, Texas and the spur of railroad of about six miles leading to said mine; also all of the terminal properties in Westwego, Gouldsboro', and New Orleans, described as follows:

All the property in the city of New Orleans, State of Louisiana, conveyed by Greenville M. Dodge to the Texas and Pacific Railway Company, by deed dated June 27th, 1883, which deed was registered in the conveyance office at New Orleans, August 9th, 1883, in Book 119, folios 208 to 212, which said deed is hereby referred to and made part hereof; for greater certainty, said property is described as follows:

1. The whole of the square bounded by Front, Water, Terpsichore, and Thalia streets, in the first district of the city of New Orleans, State of Louisiana, with all improvements thereon.

2. A certain portion of ground with all improvements thereon, forming the corner of Terpsichore and Water streets, and Terpsichore and Pilie streets. Also all the rights as riparian owner and rights of accretion in front of the New Orleans cotton press extending to the Mississippi river.

3. Certain lots of ground with all the buildings and improvements thereon, situated in the first district in the square bounded by Pilie, Water, Thalia, and Terpsichore streets, composing
68 the whole of the square bounded as above, together with a certain portion of ground bounded by Thalia, Pilie, and Terpsichore streets, and the Mississippi river and its riparian rights.

4. A certain piece of ground with all improvements thereon, in the first district, on Front street, between Henderson and Terpsichore streets, extending to the Mississippi river, forming the apparent corner of Front and Terpsichore streets and having about

one hundred and twenty-eight feet front on Front street, with its riparian rights.

5. A certain piece of ground situated in the sixth district of the city of New Orleans, with all the improvements thereon, bounded in front by the Mississippi river, in the rear by Tchoupitoulas or Levee street; on the lower line by Henry Clay avenue, and on the upper line by the New Orleans park. All said property is more fully described in said deed of said Dodge hereunto referred to, and made part hereof, and forms part of the terminals of said railway in New Orleans.

6. Also the thirty-eight lots, squares, and portions of ground, with all buildings thereon, situated in the town of Gouldsboro', formerly McDonoughville, in the parish of Jefferson, State of Louisiana, on the right bank of the Mississippi river, as set forth and described in a certain deed from G. M. Dodge to the Texas and Pacific Railway Company, dated 27th June, 1883, and recorded in said parish, August 13th, 1883, in Conveyance Book P, folios 495 to 502 inclusive, hereby referred to and made part hereof, and described as therein shown, and being in the yard limits and forming part of the terminals of said railway on the right bank of said river.

7. Also lots 14 and 15 in square 37, bounded by Adams, Jefferson, Copernicus, and Americus streets, in the town of Gouldsboro', described in a certain deed dated July 21st, 1883, from Thomas
69 Carr to the Texas and Pacific Railway Company, duly registered in Conveyance Book P, folio 481, and hereby made part hereof, and forming part of said last-named terminals in said limits.

8. Also square of ground No. 52 in the town of Gouldsboro', bounded by Jefferson, Madison, Potolemy, and Lawrence streets, containing twelve lots described in a certain deed dated January 26th, 1883, from Pierre Nougue to the Texas and Pacific Railway Company, duly registered in Book B, New Orleans, 116, folio 732; in Jefferson Book B, folios 280, 281, which deed is referred to for greater certainty and made part hereof, and forming part of said last-named terminals in said limits.

9. Also five certain lots of ground situated on the right bank of the Mississippi river opposite New Orleans, in the town of Gouldsboro', in square No. 14, bounded by Adams, Copernicus, Americus streets, and the levee, as described in a deed dated 9th December, 1882, from Louis Schwartz to the Texas and Pacific Railway Company, duly registered in Conveyance Book P, folios 232 and 233, and made part hereof for greater certainty, and forming part of said last-named terminals.

Also the lot on the actual corner of Front and Terpsichore streets, in the city of New Orleans, having forty-seven feet front on Front street, more or less, and extending to the Mississippi river, the legal line of Terpsichore street being its northerly boundary, and with the riparian rights, and forming part of the terminals of the railway company in New Orleans.

Also all and singular that certain tract and parcel of land situate

in the parish of Jefferson, in the State of Louisiana, on *on* the right bank of the Mississippi river, which was sold and conveyed to the New Orleans Pacific Railway Company by the Morgan's Louisiana and Texas Railroad and Steamship Company, by deed dated the fifteenth day of February, 1881, with other property for the
70 consideration of $745,110.42, which said deed is duly recorded in Book of Conveyances N 32, folio 199, &c., parish of Ascension, on the seventeenth day of February, 1881, and which land, comprising about one hundred and seventy-three acres, more or less, forms part of the terminals of said railway at Westwego. Also the tract of land of eighty acres, more or less, at Wheelock, parish of Iberville, formerly relay station. Also the transfer steamer "Gouldsboro'," at New Orleans, her tackle, apparel, furniture, and machinery, and the new transfer boat now being built at New Orleans. Also all the rights, privileges, and franchises conferred by the city of New Orleans and other municipal corporations on the New Orleans Pacific Railway Company and its assigns, the Texas and Pacific Railway Company, by ordinance or grant.

Also all and singular the terminal properties and facilities, and their appurtenances, situated in Westwego, Gouldsboro', and New Orleans, and now in the possession and use of the said Texas and Pacific Railway Company in the conduct and operation of its road and the transaction of its business, whether acquired by donation, purchase or expropriation, including steamboats, warehouses and docks; and including and intending to include in these presents the road-bed and superstructure and the right of way of said railroad, rails, tracks, side tracks, bridges, viaducts, buildings, depots, station-houses, car-houses, engine-houses, shops, warehouses, turn-tables, water station, fences, structures, erections, fixtures, and appurtenances, and all other things of whatever kind thereunto belonging or in anywise appertaining, or which have been or may be acquired or provided for use upon or in connection with the said railroad; and all lands acquired or designed for depots, warehouses, and other structures at either terminus, as well as along the line of said road; and also all gravel pits and sand pits at any time heretofore acquired for the use of said road, all the
71 locomotives, engines, cars, and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture, and other chattels, now or hereafter belonging or appertaining to said railroad, and all property, both real and personal, of every kind and description which shall hereafter be acquired for use upon or in connection with, or for the purposes of the said railroad, and whether acquired heretofore or hereafter by said railway company or its receivers; and all the corporate rights, privileges, and franchises which the said railway companies, or either of them, have and can exercise or shall hereafter acquire or possess, of, in, to, upon, or in respect of the said railroad, or any part thereof, or necessary for the construction, maintenance, or operation of said railroad between said points, or anything belonging or appertaining, or which may hereafter belong or appertain to the same, or any part thereof, and all the rents, issues, profits, tolls, and other income of the said railroad, and

all the rights, privileges, and franchises whatsoever which the said railway companies now possess, own, or are entitled to, and all rights, privileges, and franchises, properties real and personal, and rights and things which the said railway companies may or shall acquire, possess, or become entitled to for the purposes of or in connection with the said railway, or in the operation, use, and maintenance thereof, and all the corporate and other franchises of the said railway companies, including their franchise to be corporations. Including all the franchises, rights, privileges, and property acquired from the Southern Pacific Railroad Company, the Southern Transcontinental Railway Company, the Vicksburg, Shreveport and Texas Railroad Company, and the New Orleans Pacific Railway Company.

To have and to hold the said above-described premises, railroads, property, rights, franchises and appurtenances, unto the said
72 trustee, and its lawful successors or successor, heirs, executors, administrators, and assigns forever, to and for the only proper use and behoof of the trustee and its successors or successor, heirs, executors, administrators, and assigns forever, subject, however, to the mortgage or deed of trust to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, trustee, bearing even date herewith, to secure bonds amounting to $25,000,000, and to the payment of all the bonds issued or to be issued thereunder, as well as the school-fund loan and the mortgage on the Eastern division in said mortgage for $25,000,000 referred to.

And also subject to the right of the railway company, with the assent of two-thirds of the members of its board of directors to protect its business by the construction or acquisition of branch or connecting lines and to mortgage the branches so constructed or acquired at a rate not exceeding $12,500 a mile, and at a rate of interest not exceeding five per cent. per annum, or to assume existing mortgages of no greater amount per mile or rate of interest on branch or connecting lines, and to contract that the amount required to pay the interest upon the bonds so issued or assumed shall be made a rental charge, and in case of any deficiency in the earnings of said branch lines to meet such rental charge, that the same shall be made up out of the earnings of the lines of railway and property hereby mortgaged, and before payment of interest on the second mortgage, the sum necessary to meet such deficiency to be a charge upon the income of the railway company prior to the interest upon the said second-mortgage bonds.

But in trust, nevertheless, for the equal *pro rata* benefit and security of all and every the persons, firms, or corporations who may be or become holders of the said bonds issued under and secured by this deed of trust or mortgage without preference, priority, or distinction as to lien or otherwise of any one over the others, by
73 reason of priority in time of issuing or negotiating the same, and so that each and all of the said bonds, issued and to be issued as aforesaid, shall have the same right, lien, and privilege under and by this deed of trust or mortgage, and shall all be equally secured hereby, with like effect as if they had all been

made, executed, delivered, and negotiated simultaneously on the date of the execution and delivery hereof, it being intended that the lien and security of all of the said bonds shall take effect from the date of the execution and delivery of this deed of trust or mortgage, whether the same shall actually be sold or disposed of at such date, or whether they or any part of them shall be negotiated and sold at some future date, and that the lien and security of this deed of trust or mortgage, and all the bonds that may be issued under the same, shall take effect from the date of the execution and delivery hereof as though actually sold and delivered to and in the hands of innocent holders for value upon such date and the lien and security of said bonds shall in no manner be altered, impaired, or prejudiced by the creation of subsequent mortgages by the railway company or by the entry or acquisition of judgments or liens in any form by creditors at any future time.

And it is hereby expressly covenanted and understood, by and between the parties of the first and second parts hereto, the parties of the first part covenanting as well for themselves as for their successors and assigns, and the trustee covenanting as well *as* for itself as for its successors or successor in the trust; that the said above-described premises, railway, property, rights, franchises, and appurtenances, are to be had and holden by the said trustee upon and for the trust, uses, and purposes following, that is to say:

Article one. The bonds, to be issued under and secured by these presents, hereinafter designated as second-mortgage bonds,
74 shall not exceed in the aggregate $25,000,000; and whereas, the bonds to be issued under and secured by this mortgage, or so many thereof as shall be necessary, are together with certain bonds to be issued under the first mortgage of contemporaneous date herewith to be used for the purpose of exchanging into the bonds of the railway company and of the New Orleans Pacific Railway Company which have been deposited under the said plan of reorganization and secured by the mortgages of the railway companies, known as the Eastern Division consolidated mortgage, the New Orleans Pacific Division mortgage, the Rio Grande Division mortgage, and the general and terminal mortgage, and of settling with the holders of the land-grant bonds, and it may be unadvisable or impracticable to secure the immediate satisfaction or release of the said mortgages, it is further covenanted and agreed that the bonds issued under the said several mortgages, and deposited under the said plan, shall be transferred and delivered to the trustee of the first mortgage to be held as security for the bonds to be issued under this present indenture of mortgage and a first mortgage to be issued by the railway company contemporaneously herewith, until the said mortgages shall have been satisfied, or, in the judgment of the trustee of the first mortgage, it is prudent to cause the bonds so transferred and delivered to be cancelled.

Article two. Until default shall be made by the said Texas and Pacific Railway Company, its successors or assigns, in the due and punctual observance and performance of any one or more of the covenants and agreements herein contained, on the part and be-

half of said railway company, its successors and assigns, to be kept and performed; the said railway company, its successors and assigns, shall be suffered and permitted to have the actual possession of the railway property and premises hereinbefore described and of the whole thereof, to use and employ the same and every
75 part thereof, and to exercise and enjoy all the rights and franchises appertaining thereto, and to collect, receive, and use the tolls, incomes, rents, issues, and profits thereof, in any manner, which will not impair the lien created by these presents.

Article three. And the said Texas and Pacific Railway Company, in consideration of the premises, covenants, promises, and agrees:

I. That having possession, as aforesaid, it shall and will well and truly pay off and discharge, or cause to be paid off and discharged, each and every tax, assessment, or other liability and governmental charge, which may, from time to time, be lawfully levied or imposed by competent authority upon the said railway property and premises or upon any part thereof, the lien whereof might or could be held to be superior to the lien of these presents, and also the interest which from time to time may become due and payable upon any bonds, the payment of which is secured by a mortgage prior in lien to these presents, and the principal of said bonds as and when the same shall mature, so that the security of the bonds issued herewith shall at all times be duly maintained and preserved.

II. That having possession, as aforesaid, it shall and will at all times maintain in full quantity, number, and efficiency and keep insured its rolling stock, tools and machinery, buildings, bridges or other structures, erected or to be erected on the premises, and all other property provided for use in connection with the railway herein described, usually insured by railway companies, and in the same manner and to the same extent, and simultaneously with the execution hereof it will furnish to the trustee a full and complete inventory or schedule of said rolling stock and equipment.

III. That having possession, as aforesaid, it shall and will
76 diligently preserve all the rights and franchises to it granted and upon it conferred by the acts of Congress appertaining to the railway property and premises subject to the lien hereof and otherwise, and whenever necessary or advisable comply with the laws of any State wherein the routes aforesaid or any it may hereafter acquire the right to construct its road on or any part thereof, may now or shall at any time hereafter be situate, in such manner and form as counsel learned in the law shall advise, with a view to effectually preserve, obtain, or secure the corporate rights and franchises, enabling it to locate, construct, use, operate, and maintain the said railway line or lines, whereon these presents shall constitute a lien throughout the whole extent thereof, and charge tolls thereon for the transportation of passengers and freights, and that using and operating the said railway as the same was heretofore constructed, or as the same or any section or part thereof shall hereafter be constructed and completed, ready for use and operation, it shall and will, at all times, maintain, preserve, and keep the same, and every part thereof, with the rolling stock, fixtures, and appur-

tenances, and every part and parcel thereof, in thorough repair and working order, at least equal to its present condition in respect to the road-bed, ties, and rails, motive power, rolling stock and equipment, and fully supplied with suitable and sufficient motive power, rolling stock, and equipment, and shall and will, from time to time, make all needful and proper repairs, renewals and replacements, useful alterations, additions, betterments and improvements, so as to maintain the same in proper order and in complete repair and good working condition, so that the traffic and business of the said road and every part thereof shall at all times be done with safety and expedition.

77 IV. That it shall not and will not issue, negotiate, sell, or otherwise dispose of the second-mortgage bonds to be issued hereunder, in any manner inconsistent with the provisions of these presents, and its agreements in that behalf herein contained, and that issuing, selling, negotiating, or otherwise disposing of its second-mortgage bonds, from time to time, it shall and will well and truly apply, or cause to be applied the same, or the proceeds thereof, to and for no purposes other than those hereby contemplated as aforesaid.

V. That it shall and will well and truly pay, or cause to be paid, to the holders of the second-mortgage bonds to be issued hereunder, as hereinbefore stated, or of such of the said second-mortgage bonds as shall from time to time be outstanding and secured hereby, and every one of them, the principal thereof, according to the true intent and meaning thereof, and pay interest on said principal sum up to the rate of five per cent. per annum from December 1st, 1887, payable annually on the first day of March in each year, the first payment, if any, to be due March 1st, 1889, in like gold coin out of the net income of the railway company, as the same may be determined by the board of directors of the railway company. If the income of the railway company applicable for the interest on said bonds shall not, in the judgment of the board of directors, be sufficient to pay the said interest in full, such interest or so much as shall remain unpaid shall not accumulate, and all payments both of principal and interest shall be without deduction from either said principal or interest for any tax or taxes which, by any present or future laws of the United States or the States of Texas and Louisiana, may be payable for or in respect of the said principal or interest for national, State, or municipal purposes; the railway company hereby

78 agreeing to pay any such tax or taxes which it may now or hereafter be required by any such law to retain therefrom.

And in case of default of such payment by said Texas and Pacific Railway Company, from any cause whatever, the railway companies for the consideration in said second-mortgage bonds mentioned, further hereby covenant, promise, and agree that they shall not and will not at any time hereafter insist on or plead in any manner whatever, claim or take the benefit or advantage of any stay or extension law, which may now or at any time hereafter be in force, in any locality where the railway property and premises hereby conveyed or intended so to be, or any part thereof, may or

shall be situate; or claim, take, or insist on the benefit or advantage to be derived from any law, now or hereafter in force, as aforesaid, providing for the valuation or appraisement of said railway property or premises, or any part thereof, prior to any sale or sales thereof to be made pursuant to the provisions hereinafter contained, or the decree of any court of competent jurisdiction; or after any such sale or sales, claim or exercise any right which they may now or hereafter have, by statute enacted by the legislature of the State of Texas or Louisiana, or other State wherein the said railway property or premises, or any part thereof, shall or may be situate, to redeem the property so sold, or any part thereof; and said railway companies hereby expressly waive all benefit and advantage that they might or could derive by virtue of any such law or laws and agree not to hinder, delay, or impede the execution by said trustee of the powers of entry and sale hereinafter conferred upon, granted, and delegated to it, but to suffer and permit the execution of such powers, as if such law or laws had not been made or enacted.

VI. Further, that at all times until said second-mortgage
79 bonds, with interest, shall be fully paid, the railway company will permit the trustee, its agents, clerks, or attorneys, for that purpose to be duly authorized, fully to inspect all books of account of the railway company, together with its books, reports, memoranda, or other papers, and to take such extracts therefrom as may be deemed expedient to fully report thereon, with convenient details. And further, that if at any time the net income of the road hereinbefore conveyed properly applicable to the payment of the interest on the outstanding bonds hereby secured shall be insufficient for such payment, the railway company will, without delay, furnish to the trustee full and detailed accounts and statements of the gross earnings and receipts of said road, and of all the expenses, disbursements, and deductions out of or charged against the same during the period in which there shall be such deficiency.

VII. The railway company shall and will from time to time hereafter, upon the demand of the trustee, grant, convey, confirm, assign, transfer, and set over unto the said trustee all real estate which may be hereafter acquired, and all personal estate, corporate rights, and franchises which it, the railway company, shall hereafter in any way or manner acquire as appurtenant to, or in, or for use upon, or for the business of the railroads hereby mortgaged, or any of them, and shall and will also make, do, seal, execute, deliver, and acknowledge, or cause to be made, done, sealed, executed, delivered, and acknowledged, all and every such further acts, matters, things, deeds, conveyances, bills of sale and transfers, and assurances in the law for the better assuring, conveying, and confirming unto the trustee all and singular the hereditaments and premises, estates and property hereby conveyed, or intended so to be, or which are hereby covenanted and agreed to be here-
80 after conveyed to the said trustee as by such trustee, or their counsel learned in the law, shall be desired or acquired for

the better effectuating and carrying out the provisions, objects, and purposes of this mortgage, and securing payment of the principal and interest of the bonds intended to be hereby secured; all of which estates shall be held by the said trustee in, under, and upon the several and respective tru-ts, and for the uses and purposes and subject to the powers and authorities herein mentioned, declared, given, and expressed.

Article four. In case default shall be made by said railway company on or after March 1st, 1892, in the payment of full interest at the rate of five per cent. per annum on any of the second-mortgage bonds which may at any time have been issued and be then outstanding and secured by these presents or in case default shall be made by said railway company in the payment of the principal of any of such bonds when and as the same, according to the terms thereof, shall mature; or in case default shall be made by said railway company in the payment of any tax, assessment, or other governmental charge lawfully levied and imposed upon the said railway property and premises, or any part thereof, or any other prior lien, and such default shall continue for the period of three months after such tax, assessment, or other governmental charge or lien shall have become due and payable; or in case said railway company shall make default in the due observance and performance of its covenant of further assurance, or any other of its covenants, promises, and agreements herein contained, and either of such defaults continue for the period of three months; then and in each and every such case of default continued as aforesaid, on the request of holders of not less than one-third of the bonds outstanding the said trustee shall personally, or by its agent or agents, attorney or attorneys, enter into and upon all and singular
81 the railway property and premises, lands, rights, interests, and franchises hereby conveyed or intended so to be, and each and every part thereof, and exclude the said railway company, its agents and servants wholly therefrom, and having and holding the same, use and operate, manage and control said railway, regulate the tolls for the transportation of passengers and freight thereon, and conduct the business thereof, either personally or by its superintendent, managers, receivers, agents, and servants or attorneys, to the best advantage of the interests as well of the public as of the holders of second-mortgage bonds secured hereby in accordance with law and any statute relating to said railway or any part thereof, or to the operation thereof; and upon such entry it shall be lawful for the said trustee from time to time to insure or keep insured, at the expense of the trust estate, the rolling stock, tools and machinery, and other property, buildings, bridges, and structures erected or provided for use in connection with said railway, and whereof it shall become possessed as aforesaid in the same manner and to the same extent as is usual with railway companies; and likewise to make from time to time, at the expense of the trust estate, all necessary or proper repairs, renewals, and replacements, and useful alterations, additions, betterments, and improvements thereto and thereon, as well in respect of the rolling stock or equip-

ment as in respect of the railway and appurtenances and other subject-matters as may seem to it judicious; and to collect and receive all tolls, freights, incomes, rents, issues, and profits of the same, and every part thereof, and after deducting the expenses of operating said railway and conducting the business thereof, and of all repairs, renewals, replacements, alterations, additions, betterments, and improvements, and all payments which may be made for taxes, assessments, insurance, and other proper charges upon the said premises and property, or any part thereof, as well as a
82 just and reasonable compensation for its own services and compensation to all agents, clerks, servants, and other employees by it properly engaged and employed, the said trustee shall apply the moneys arising as aforesaid, to the payment of the interest which shall be due and payable on the bonds outstanding and secured hereby, in the order in which such interest shall become due, ratably to the persons or parties entitled to receive the same: Provided, however, That the holders of a majority of the said bonds may appoint a committee to direct and supervise the management of the property by said trustee, which committee shall have such powers, control, and supervision, as are or may be conferred upon and exercised by the board of directors of the railway company.

Article five. There shall be no right of foreclosure under this mortgage for default in the payment of interest upon the bonds issued under and secured hereby, except in the event of the foreclosure of the first mortgage, but in case default shall be made by the said company in the payment of the principal of any of the said second-mortgage bonds, when the same shall become due as therein or hereinbefore provided, and in each such case of default it shall be lawful for the said trustee, after entry as aforesaid, or other entry, or without any entry, personally or by its attorneys or attorney, agents or agent, to sell and dispose of all and singular the railway property and premises, rights, franchises and interests, lands and appurtenances, hereby conveyed or intended so to be, or from time to time as they shall deem proper, of so much thereof as may be sold separately without material injury to the parties interested, and be sufficient to pay the amount due on such bonds then outstanding, for principal and interest, according to the terms thereof, together with the costs and expenses of such sale, and of all right, title,
83 and interest, claim and demand whatsoever, benefit, equity of redemption, and statutory right to redeem of the said company, its successors and assigns, of, in, and to the same, or so much thereof as may be sold, and every part thereof, at public auction at such place in the city of New Orleans, or on the premises or any part thereof, and at such time and upon such terms as may be specified in the notice of sale to be given as hereinafter provided, for the highest and best price the same will bring in cash.

Preparatory to such sale the said trustee shall give notice of the time and place, when and where, and the terms upon which, the same is to be made, and containing a description of the property to be sold, by advertisement thereof in one newspaper at that time published in each of the cities of New Orleans, Philadelphia, and New York, and

in the State of Texas, once a week for six successive weeks; and upon any sale or sales under this instrument the said trustee is hereby empowered to make, execute, and deliver to the purchaser or purchasers at any such sale a good and sufficient deed, or good and sufficient deeds of conveyance for the railway property and franchises sold. In case of any sale or sales by virtue of any of the provisions of this instrument, the said company hereby expressly and absolutely agrees to waive, and hereby irrevocably waives the benefit or advantage of any and all valuation, stay, appraisement, or extension laws, and any statutory right to redeem, now existing, or which may hereafter be in force in the State or States wherein the property to be sold under this instrument or any part thereof, may at the time of the sale be situate, or where the sale may take place, which, but for this provision, agreement, and waiver might be operative, in respect of any such sale, or might be availed of to prevent or postpone an absolute or immediate sale under the provisions of this instrument, or to redeem after any sale the property sold
84 thereat, or any part thereof; and it is likewise expressly declared that any sale or sales made by said trustees, under or by virtue of this instrument, when completed, shall operate to divest all title, rights and interest, claims and demands whatsoever both at law and in equity of said railway companies of, in, and to the rights, property, powers, privileges, and franchises sold, and shall be a perpetual bar both at law and in equity against the said railway companies, their successors and assigns, and any and all persons whomsoever claiming or to claim the railroad property, rights, powers, privileges, and franchises sold, or any part or parcel thereof, by, from, through, or under the said railway companies, its successors and assigns, or any of them. And the said trustee shall apply the proceeds or avails of any sale to be made under the provisions of this instrument, and the purchase-money paid thereon, after deducting therefrom just allowances for all expenses connected therewith, including attorney and counsel fees, as well as any and all advances, expenses, and liabilities which may have been made or incurred by said trustee in using, operating, maintaining, and preserving said railroad property and premises, or in carrying on and managing the business for the period the same may have been in the said trustee's possession, or in arranging for making and completing the sale and payments for taxes, assessments, or other charges or liens prior to the lien of these presents, if any such there shall then be, and the said railway property and premises, or any part thereof, shall not have been sold subject thereto, as well as just and reasonable compensation for the said trustee's own services, to the payment of the principal of such of said bonds as may be at that time outstanding, and of the interest which shall have accrued upon the said principal up to that time, according to the
85 tenor thereof, without discrimination or preference as between principal and interest, but ratably, to the aggregate amount of such principal and accrued interest; it being understood and hereby declared and agreed, that such payment shall be made to the persons holding the bonds evidencing the right to such

principal and interest, without discrimination or preference between them on account of the time of the actual issue of said bonds, and, if after payment in full of all the said bonds, principal and interest, a surplus of the said proceeds of sale shall remain, the said trustee shall pay over such surplus to the said railway company, its successors or assigns, or as any court of competent jurisdiction shall lawfully direct.

And it is hereby declared and agreed that the said trustee may, from time to time, adjourn any sale to be made under the provisions of this instrument, by announcement made at the time and place appointed for such sale, and if so adjourning such sale, may make the same at the time and place to which the same shall be so adjourned, and without further notice thereof.

And it is further declared and agreed that the receipt of the trustee shall be a sufficient discharge to the purchaser or purchasers of the property, which shall be sold as aforesaid for his or their purchase-money, and that such purchaser or purchasers, his or their heirs, executors, or administrators, shall not, after paying such purchase-money and receiving such receipt, be liable to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in any manner whatsoever answerable for any loss, misapplication, or non-application of any such purchase-money, or any part thereof.

And it is further agreed that no part of the premises hereby mortgaged or intended so to be shall be sold under proceedings at
86 law, by the holder or holders of all or any of the bonds intended to be hereby secured, it being the intention and agreement of the parties for the better securing the largest possible price for the mortgaged premises in the event of a sale thereof, that the same shall only be sold in the manner herein provided or under proper proceedings in a court of equity for the foreclosure of this mortgage.

Article six. It is hereby mutually agreed, that at any public sale of the railway property, premises, rights, privileges, and franchises hereinbefore conveyed, made by virtue of the powers herein granted, or by judicial authority, for the purpose of enforcing the lien of these presents, the trustee, under these presents, for the time being may, in its discretion and not otherwise, bid for, and if the same be obtainable at the price hereafter mentioned, purchase and acquire the property so offered for sale, in behalf of all the holders of bonds secured by this instrument, which shall then be outstanding, in proportion to the amount of said bonds by them respectively held: Provided, however, that nothing herein contained shall authorize the said trustee to bid, on behalf of the holders of said bonds, a sum exceeding the whole amount of said bonds then outstanding, with the interest accrued thereon, according to the tenor thereof, and the costs and expenses of such sale for the entire property then held upon the trusts of this indenture, or any amount reasonably proportionate thereto, for any part of said property.

And it is further agreed, that the second-mortgage bonds shall be received in payment of the purchase-money of any property sold

by virtue hereof, as equivalent to so much cash of the said purchase-money as would be distributable and payable thereon.

87 Article seven. Upon the filing of a bill in equity or other commencement of judicial proceedings to enforce the rights of the trustee and of the bondholders under these presents, the said trustee shall be entitled to exercise the right of entry herein conferred, or to the appointment by any court of competent jurisdiction of a receiver or receivers of the property hereby mortgaged, or of the earnings, revenue, rents, issues, or profits thereof, pending such proceedings, with such powers as the court making such appointment shall confer.

Article eight. The railway company may at any time hereafter and before the full payment of the bonds secured hereby, and whenever it shall deem it expedient for the better security of the said bonds, although there may not then have occurred any such default as to entitle the said trustee to enter into possession under article five hereof, surrender and deliver to said trustee full possession of the whole, or any part of the said railway property and premises, rolling stock, lands and appurtenances, rights, franchises and interests hereby conveyed or intended so to be, for any term or terms, certain or indefinite. The said trustee, upon such surrender and delivery, may at its option, enter into and upon the premises so surrendered and delivered, and take and receive possession thereof, for such term or terms, certain or indefinite, as aforesaid, without prejudice, however, to its rights at any time subsequently to insist upon and maintain such possession, though beyond such term, whenever it would have been entitled thereto, had no such voluntary surrender been made.

And upon the voluntary surrender and delivery of the said railway property and premises, or any part thereof, as herein provided, the said trustee shall and will during the term or terms for

88 which possession shall be taken, and while said property and premises shall remain in its possession, work, use, manage, control, and employ the same, in accordance with the provisions of article four of these presents, and receive the incomes and revenues thereof, and apply the same to the best advantage of all parties in interest.

Article nine. And it is further mutually agreed that the said railway company shall and will keep a register or registers of bonds issued hereunder at its office or agency in the city of New York, which shall at all reasonable times be open to the inspection *to* the trustee, and that any holder or holders of any of the bonds issued under the provisions hereof may register his or their bond or bonds upon presenting the same, and that when a bond shall be so registered the person or persons in whose name or names the same shall be registered, shall be deemed and regarded as the owner or owners thereof for all purposes, and the payment of or on account of the principal sum in such registered bond mentioned, shall thereafter be made to such person or persons, his or their order only, and all such payments so made shall be valid and effectual to satisfy and discharge the liability upon such bond to the extent of the sum or

sums so paid, provided that such registry may be changed, and the bonds so registered be transferred, upon presentation with the written order of the person or persons in whose name or names the same shall stand registered, properly authenticated, to the person or persons whose name or names shall in such written order be contained to that end; and thereafter the person or persons to whom such bond shall have been so transferred as aforesaid shall be held to be the owner or owners thereof with all the incidental rights and powers, and such transfers may be made from time to time as the registered owner or owners of any such bond for the time being may direct as aforesaid; and the registered owner or owners shall also have the right to register any of the bonds registered in his or their names, as payable to bearer, in which case the transferability by delivery shall be restored, and the principal thereof be payable to the person presenting the same. But any holder or holders of a bond registered to bearer may again cause such bond to be registered in his name or their names with the same effect as the first registration, and successive registrations as aforesaid may be made from time to time as desired.

It is further mutually agreed that any registered owner may likewise make such interest on any bond standing registered in his name, payable only to him or his order, by surrender of all coupons to such bonds annexed and representing the interest to become due thereon, which surrender when certified on such bond as aforesaid, shall not in anywise operate as a discharge to the railway company of its obligation to pay such interest as in said bonds provided, but payments of such interest shall nevertheless thereafter be made to the person appearing on such registry as the owner thereof, or his order, at the time such interest shall become payable, and any such payments so made shall be valid and effectual to satisfy and discharge the obligation for such interest to the extent of the sum or sums so paid.

Article ten. The trustee shall have full power, in its discretion, and upon the written request of the said railway company, at any time to release from the lien and operation of this trust deed and of the said bonds, unto the railway company, or to persons by it designated therefor, any portion or portions of the premises acquired, held, or used by said railway company for the purpose of stations, depots, shops, or other buildings or erections or other uses not connected with the maintenance and operation of the railway or any part thereof, or which may have been acquired or held for the supply of gravel, fuel, and other materials for the purposes of said railway or any part thereof, which, in the judgment of the trustee shall, at the time of such release, be no longer requisite for the use for the purposes for which the same shall have been so acquired or used, nor necessary or expedient to be retained for use in connection with the said railway line, in or along the routes aforesaid, or any of them, and likewise any parts of the original line of track or roadway, and of the depot grounds, buildings or accommodations connected therewith, which may have been thrown out of use, and ceased to form part of the railway, at

the time of such release, by reason of straightening or alteration of the line of the road: Provided always, That the power of release given by this article is designed to be exercised only in case of the railway company's selling or contracting to sell the property so to be released, because of its being no longer required for the uses or purposes of said railway, and requiring the same to be so released, in order to give a perfect title to the purchaser or purchasers: And provided, further, That where such released premises shall have been thrown out of use, or ceased to be required, by reason of changes of the line of the road, on or along the routes aforesaid, or any of them, or change of depot grounds, buildings or other accommodations, the substitutes which the railway company shall have acquired therefor shall be conveyed by appropriate deeds to the trustee upon the trusts and for the purposes of this indenture, before the giving of such release: And it is further provided, That the trustee shall also have full power to allow the said
91 railway company, from time to time, to dispose of, according to its discretion, such portion of the machinery, equipments, and implements, at any time held or acquired for the use of the said road, as may have become unfit for said use, provided the same be replaced by new, which shall be conveyed to the trustee, or be otherwise made clearly subject to the operation of these presents.

That the said trustee shall not be answerable for the default or misconduct of any agent or attorney who may be appointed by them in pursuance hereto, if such agent or attorney be selected with reasonable care; or for anything whatsoever, in connection with this trust, except misconduct or gross negligence; the said trustee shall not be personally liable for any debts contracted by it, for damages to persons or property carried or injured, or for salaries, or non-fulfillment of contracts, during any period while said trustee shall manage the trust property or premises upon entry or voluntary surrender as aforesaid, but all such debts and liabilities shall be and constitute a first and paramount charge upon the trust funds and property.

It is mutually agreed that the term or words "the trustee," "said trustee" and "the said trustee," as used in this indenture, shall be held and construed to mean the trustee for the time being, whether original or new, and whenever a vacancy shall exist, to mean the continuing trustee, and such trustee shall, during such vacancy, be possessed of and be competent to exercise all the powers be these presents granted to the parties of the second part.

And it is further mutually agreed that the said trustee, or any trustee or trustees hereafter appointed, may resign and be discharged of the trusts created by these presents by giving notice in writing, to the said company and to the bondholders, by
92 publication thereof, at least twice a week, for six successive weeks, in a newspaper published in New York city, at least thirty days before such resignation shall take effect, and upon the due execution of the conveyance hereinafter required.

And it is further agreed that the trustee may be removed at any time by an instrument in writing, under the hands and seals of a

majority in interest of the holders of the bonds secured hereby and then outstanding, and in case a trustee should die, or should resign or be removed, as herein provided, or by a court of competent jurisdiction, a majority in amount of holders of the then outstanding bonds hereunder, shall have the right and power, by instrument in writing under their hands and seals, to appoint a new trustee to fill such vacancy, and until such appointment be so made by a majority of the bondholders, the board of directors of the railway company may appoint a new trustee to fill such vacancy for the time being, but subject to the right of removal by the holders of a majority of said bonds as already provided, and in either case the new trustee so appointed shall, while he continues as such, have and possess, and be subject to the like rights, power, estates, and duties as if he had been the original trustee hereunder; and should any deeds, conveyances, or instruments in writing, to be executed, acknowledged, and delivered on the part of the railway company, and the resigning or removed trustee, or either of them, be required by such new trustee, for more fully and certainly vesting in and confirming to him such estate, rights, powers, and duties, such deeds, conveyances, and instruments of writing shall on request be made, executed, acknowledged, and delivered.

And it is further expressly understood and agreed that all the covenants, stipulations, promises, and agreements herein
93 contained by or on behalf of said company, shall bind and be binding upon its successors and assigns, whether so expressed or not.

Article eleven. If the said company shall well and truly pay or cause to be paid all bonds to be issued under or entitled to the protection of this deed of trust, and the coupons attached thereto, at the times and in the manner therein specified, and shall well and truly keep and perform all the things herein required to be kept and performed by it, according to the true intent and meaning of these presents, then, and in that case, all property, rights, and interests hereby conveyed shall revert to the said company, and the estate, right, title, and interest of the said trustee aforesaid, shall thereupon cease, determine, and become void; otherwise the same shall be, continue and remain in full force and virtue.

And inasmuch as it is intended that this indenture shall be simultaneously recorded in the proper office in each of the several counties of Texas and parishes of Louisiana wherein the railway property and premises conveyed hereby, or intended so to be, or some part thereof is situate, or as near at the same time as possible; this indenture further witnesseth that although twenty copies or counterparts thereof are simultaneously executed by the company under its corporate seal, attested by its president and secretary, in pursuance of a resolution of its board of directors, and delivered to the said trustee; and the said trustee, in evidence of its acceptance of the trusts thereby created, have likewise to each of said twenty copies or counterparts set their hands and affixed their seals simultaneously, to the end that one thereof may be recorded in each of said counties as aforesaid, all such copies or counterparts so executed

and delivered, each as an original, shall constitute but one instrument.

94 Article twelve. And this indenture witnesseth that it is further declared that this instrument, embracing property situated in the States of Texas and Louisiana, is intended in both States to be a mortgage of all the property hereinbefore described; and is intended to mortgage, hypothecate, and affect, and the parties of the first part do hereby mortgage, hypothecate, and affect the said property in the State of Louisiana unto and in favor of the party of the second part, as well as in favor of any present or future holder of said bonds or coupons, or any of them, for securing the payment thereof, and all other covenants of the mortgagors herein contained; so as to make this instrument as to all said property in the State of Louisiana a mortgage according to her laws and jurisprudence, and not an act of sale. And this indenture, so far as it embraces property situate in the State of Texas, is also intended to be a mortgage thereof according to her laws, for the purposes and upon the trusts in this indenture set forth.

95 In witness whereof, the parties hereto have caused their respective corporate seals to be hereunto affixed and the same to be attested by the signatures of their respective presidents and secretaries, in pursuance of resolutions of their boards of directors, the day and year first above written.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By JNO. C. BROWN,
1st Vice and Acting President.

[Seal of the Texas and Pacific Railway Company.]

Attest: C. E. SATTERLEE.
Secretary.

Witnesses:
CHAS. BOURKE.
W. R. FIELD,
and
THOS. B. CLIFFORD,
Commissioner.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY,
By E. B. WHEELOCK, *President.*

[Seal of the New Orleans Pacific Railway Company.]

Attest: ROBT STRONG,
Secretary.

Witnesses:
J. R. EDGETT.
C. M. EUSTIS.

The Mercantile Trust Company, trustee named in the foregoing indenture of mortgage, hereby accepts the trusts in the said mortgage declared and provided, and agrees to perform the same.

Witness the corporate seal of the Mercantile Trust Company of New York, this twenty-first day of February, one thousand eight hundred and eighty-eight.

THE MERCANTILE TRUST COMPANY,
By LOUIS FITZGERALD, *President.*

Attest:
[SEAL.] H. C. DEMING, *Secretary.*

96 THE STATE OF NEW YORK, } ss.:
City and County of New York, }

Before me, Thomas B. Clifford, a notary public in and for the city, county, and State aforesaid, this day personally appeared John C. Brown, who is personally known to me to be the person whose name is subscribed to the foregoing instrument, and to be first vice-president of the Texas and Pacific Railway Company, and acknowledged that he, as such vice-president and by authority of said company and as acting president (the president being now absent from the country), executed the same for said corporation and for the purposes and consideration therein expressed, and that the seal affixed thereto is the common or corporate seal of said corporation.

[SEAL.] THOMAS B. CLIFFORD,
Notary Public, City and County of New York.

97 STATE OF NEW YORK, }
City and County of New York, }

Be it remembered that on the 20th day of Feb., A. D. one thousand eight hundred and eighty-eight, before me, the undersigned, Thos. B. Clifford, duly commissioned and authorized to take the acknowledgement and proof of the execution of deeds and other instruments of writing to be recorded or used in the State of Louisiana, as also to administer oaths, affirmations, &c., and to take and certify depositions, personally appeared the above-named John C. Brown, the vice-president and acting president (the president being now absent from the country), and C. E. Satterlee, the secretary, of the Texas and Pacific Railway Company, and executed the above instrument of writing in my presence and that of the two witnesses whose names are thereto subscribed as such; and thereupon said John C. Brown, as vice-president and acting president, and said C. E. Satterlee, as secretary, of said Texas and Pacific Railway Company, acknowledged that they had signed and executed the same as their act and deed for the consideration, uses, and purposes there mentioned, in their said respective capacities, and as the act and deed of said Texas and Pacific Railway Company.

And said Messrs. John C. Brown and C. E. Satterlee, being by me first duly sworn, did, each for himself, depose and say that the said John C. Brown is the vice-president and acting president and C. E. Satterlee is the secretary of the Texas and Pacific Railway Company; that in such capacities they signed and executed the above instrument by order of the board of directors as and for the

act and deed of said Texas and Pacific Railway Company; that the seal thereto affixed is the corporate seal of said company, and that it was affixed by order of the board of directors.

98 In testimony whereof I have hereunto set my hand and affixed my seal of office as commissioner aforesaid, at my office, in said city of New York, on the day and date above written.

[SEAL.] THOS. B. CLIFFORD,
Commissioner of Deeds for Louisiana in New York.

99 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on the 20th day of Feb., anno Domini one thousand eight hundred and eighty-eight, before me, the subscriber, a notary public in and for the city of New York aforesaid, personally appeared C. E. Satterlee, to me personally known, who, being duly affirmed according to law, deposes and says—

That he is the secretary of the Texas & Pacific railway, the corporation named in the above and foregoing indenture of mortgage; that he was personally present at the execution of the said indenture of mortgage and saw the corporate seal of said company affixed thereto; that John C. Brown, the vice-president and acting president of the said company, did then sign, seal, and deliver the said indenture of mortgage as his act and deed and as the act and deed of said company by virtue of the authority vested in him as such vice-president and by a resolution of the board to execute the same and desire that the said indenture of mortgage might be recorded as such act and deed; that the seal so affixed is the common or corporate seal of the said company; that he, the deponent, at the same time signed his name to the said indenture of mortgage as a subscribing witness thereto and as said secretary in attestation of the due execution and delivery thereof, and that the names of the said vice-president and acting president and of this deponent subscribed to the said indenture of mortgage as aforesaid are of their own proper and respective handwriting.

C. E. SATTERLEE.

Affirmed and subscribed before me the day and year aforesaid.

[SEAL.] W. R. FIELD,
Notary Public for New York.

100 STATE OF LOUISIANA, }
Parish of Orleans, City of New Orleans, }

Be it remembered that on the 25th day of February, A. D. one thousand eight hundred and eighty-eight, before me, the undersigned, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and authorized to take the acknowledgement and proof of the execution of deeds and other instruments of writing to be recorded or used in the State of Louisiana, as also to administer oaths, affirmations, &c., and to take and certify depositions, personally appeared the above-named E. B. Wheelock, the

president, and Robert Strong, the secretary, of the New Orleans Pacific Railway Company, and executed the above instrument of writing in my presence and that of the two witnesses whose names are thereto subscribed as such; and thereupon said E. B. Wheelock, as president, and said Robert Strong, as secretary, of said New Orleans Pacific Railway Company, acknowledged that they had signed and executed the same as their acts and deeds for the consideration, uses, and purposes there mentioned, in their said respective capacities, and as the act and deed of said New Orleans Pacific Railway Company.

And said Messrs. E. B. Wheelock and Robert Strong, being by me first duly sworn, did, each for himself, depose and say that the said E. B. Wheelock is the president and said Robert Strong is the secretary of the New Orleans Pacific Railway Company; that in such capacities they signed and executed the above instrument by order of the board of directors as and for the act and deed of said New Orleans Pacific Railway Company; that the seal thereto affixed is the corporate seal of said company, and that it was affixed by order of the board of directors.

In testimony whereof I have hereunto set my hand and affixed my seal of office, as notary public aforesaid, at my office, in said city of New Orleans, on the day and date above written.

[SEAL.] J. G. EUSTIS,
Notary Public.

101–271 STATE OF LOUISIANA, }
City of New Orleans. }

Personally appeared before the undersigned, a duly appointed and qualified commissioner of the State of Texas in and for the city and State aforesaid, the above-named E. B. Wheelock, the president, and Robert Strong, the secretary, of the New Orleans Pacific Railway Company, and acknowledged in due form of law the aforegoing indenture to be their act and deed in their several capacities and as and for the act and deed of the New Orleans Pacific Railway Company, and desired the same to be recorded as such; and said Robert Strong, being by me first duly sworn, did depose and say that he was personally present and did see the common or corporate seal of the above-named New Orleans Pacific Railway Company affixed to the foregoing indenture; that the seal so affixed is the common or corporate seal of said corporation; that the above-named E. B. Wheelock is the president of said corporation and did sign the said indenture as such in the presence of deponent; that this deponent is the secretary of said corporation, and that the name of this deponent within signed in attestation of the due execution of said indenture is of this deponent's own handwriting, and that said indenture was signed by deponent as such secretary and by said E. B. Wheelock as president of the New Orleans Pacific Railway Company under authority in them vested by the board of directors of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal as a commissioner of Texas at New Orleans, Louisiana,

this twenty-fifth day of February, in the year one thousand eight hundred and eighty-eight (1888).

(Signed) J. G. EUSTIS,
[SEAL.] *Commissioner.*

272 In the Circuit Court of the United States for the Western District of Texas.

THE MERCANTILE TRUST COMPANY, Complainant,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY, JOHN H. REAGAN, William P. McLean, and L. L. Foster, Constituting the Railroad Commission of Texas, and Charles A. Culberson, Defendants.

The Answer of the Defendant The Texas and Pacific Railway Company to the Bill of Complaint of the Complainant Herein.

The defendant The Texas and Pacific Railway Company, now and at all times hereafter reserving all manner of benefit and advantage to itself of exception to the many errors and insufficiencies in said bill contained, for answer thereto or unto so much or such parts thereof as this defendant is advised it is material for it to make answer unto, answering, says—

That for the purpose of avoiding unnecessary prolixity in this answer this defendant, inasmuch as it cannot deny, hereby admits all the allegations in the said bill of complaint contained, except in so far as the same or parts thereof shall be hereinafter denied, modified, or qualified.

Touching the allegations contained in the bill of complaint purporting to state the diminution of the revenues of the defendant railway company which would be consequent upon the adoption and enforcement of the rates and tariffs promulgated by the railroad commission, this defendant states that the actual diminution
273 and reduction of revenues consequent upon the enforcement and operation of such rates and tariffs largely exceeds the estimates and statements so alleged, and in this behalf defendant avers that the losses in revenues which it has sustained by reason of the operation of the said rates and tariffs of the said railroad commission during the months of September, October, November, and December, 1891, and January, February, and March, 1892, aggregate the sum of $212,721.61; that these losses are almost wholly losses in net revenue.

Touching the allegations in the sixteenth article or subdivision of the bill of complaint, this defendant specially admits that it has been requested by the complainant herein to refuse to recognize, adopt, or enforce the rates prescribed in the schedules, circulars, and orders of said railroad commission, and further admits that it has declined to comply with such request, but has, under protest, put in force said rates as far as the same have been declared effective by said commission, except the rates prescribed in said commission's commodity tariffs Nos. 13, 15, 17, 18, 19, 20, and 21.

And this defendant avers and alleges that although said rates so fixed are unfair, unjust, unreasonable, and confiscatory, and although it denies that the same can be lawfully applied to it, it has declined to so refuse to adopt the same, and has, under protest as aforesaid, put the same into effect (with the exceptions aforesaid), fearing that by reason of the multiplied and excessive fines and penalties denounced by the act of April 3d, 1891, constituting the railroad commission, and by reason of the innumerable suits therein and thereby authorized and provided for and the vast cost and expense attending the defense thereof, the consequences of such refusal might be even more disastrous than the operation and effect of said unreasonable rates, and this defendant, now submitting itself to such
274 orders and decrees as this honorable court may make herein, avers that it is remediless and without protection in this behalf except in this honorable court, and prays that such decrees and orders as this court may make herein shall be made with due regard to its protection in the premises.

And now, having fully answered, this defendant prays to be hence dismissed with its reasonable costs and charges in this behalf sustained.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By GEO. J. GOULD, *Vice-president.*
R. S. LOVETT, *Solicitor for said Defendant.*
Attest: C. E. SATTERLEE, *Secretary.* [L. S.]
W. W. HOWE,
WINSLOW S. PIERCE,
Of Counsel.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

George J. Gould, being duly sworn, says that he is the first vice-president of the defendant The Texas and Pacific Railway Company named in the foregoing answer; that he has read the answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

GEO. J. GOULD.

Sworn and subscribed to before me this 23d day of May, 1892.
E. A. JACKSON,
[L. S.] *Notary Public, N. Y. Co.*

274½ [Endorsed:] In the circuit court of the United States for the western district of Texas. The Mercantile Trust Company, complainant, against The Texas & Pacific Railway Company, John H. Reagan, and others. In equity. No. 186. Answer of the Texas & Pacific Railway Company. R. S. Lovett, solicitor for defendant The Texas & Pacific Railway Company. W. W. Howe, Winslow S. Pierce, of counsel. Filed June 2, 1892. B. G. Duval, clerk, by D. H. Hart, d'y.

275 In the Circuit Court of the United States for the Western District of Texas. In Equity.

THE MERCANTILE TRUST COMPANY, Complainant, *vs.* THE TEXAS & PACIFIC RAILWAY COMPANY, JOHN H. REAGAN, *et als.*, Defendants.	Original Bill.
THE TEXAS & PACIFIC RAILWAY COMPANY, Complainant, *vs.* THE MERCANTILE TRUST COMPANY, JOHN H. REAGAN, *et als.*, Defendants.	Cross-bill.

Leave is hereby granted to the Texas and Pacific Railway Company to file its cross-bill in the above styled and numbered cause, as prayed for therein.

A. P. McCORMICK,
Circuit Judge.

[Endorsed:] No. 186. Mercantile Trust Co. *vs* T. & P. R'y Co. *et als.* Order granting leave to file cross-bill. Filed June 6, '92. B. G. Duval, clerk, by D. H. Hart, d'y.

276 Original.

In the Circuit Court of the United States for the Western District of Texas. In Equity.

THE MERCANTILE TRUST COMPANY, Complainant, *against* THE TEXAS & PACIFIC RAILWAY COMPANY, JOHN H. REAGAN, and Others.	Original Bill.

No. 186.

THE TEXAS & PACIFIC RAILWAY COMPANY, Complainant, *against* THE MERCANTILE TRUST COMPANY, JOHN H. REAGAN, and Others.	Cross-bill.

Cross-bill of the Texas & Pacific Railway Company.

R. S. Lovett, solicitor for cross-complainant.
W. W. Howe, Winslow S. Pierce, of counsel.

Filed June 6th, 1892.

B. G. DUVAL, *Clerk,*
By D. H. HART, *Dy.*

276½ In the Circuit Court of the United States for the Western District of Texas, Fifth Circuit. In Equity.

THE MERCANTILE TRUST COMPANY, Complainant, *against* THE TEXAS AND PACIFIC RAILWAY COMPANY, JOHN H. REAGAN, and Others, Defendants.	Original Bill.
THE TEXAS AND PACIFIC RAILWAY COMPANY, Complainant, *against* THE MERCANTILE TRUST COMPANY, JOHN H. REAGAN, and Others, Defendants.	Cross-bill.

Cross-bill of the Texas and Pacific Railway Company.

To the judges of the circuit court of the United States for the western district of Texas, fifth circuit, sitting in equity:

277 The Texas and Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the United States, by leave of court first had and obtained, brings this its cross-bill of complaint against The Mercantile Trust Company, the complainant herein, the "Railroad Commission of Texas," organized under an act of the legislature of the State of Texas, approved April 3d, 1891, and which is a citizen of the State of Texas, and whose office is in the western district of Texas, and which is a resident and inhabitant of said district; and John H. Reagan, William P. McLean and L. L. Foster, citizens and residents of the State of Texas, constituting said "railroad commission of Texas," and Charles A. Culberson, a citizen and resident of said State of Texas; and thereupon, humbly complaining, your orator shows unto your honors as follows:

First. That on or about the 13 day of April, 1892, the said Mercantile Trust Company filed and exhibited in this court its bill of complaint against your orator and against said Reagan, McLean and Foster and Charles A. Culberson, as defendants, wherein and whereby the said Mercantile Trust Company, complainant, alleged, in substance:

That the defendants Reagan, McLean and Foster, claiming to act as the railroad commission of Texas, and appointed under and by virtue of an act of the legislature of the State of Texas, approved on the 3d day of April, 1891, had announced and undertaken to establish and make effective as against your orator and other railroad companies operating railroads in the State of Texas, certain rates, tariffs, schedules and classifications for the transportation of commodities therein described over the lines of railway of your orator and of other railroad companies of the State of Texas.

That said complainant is trustee of the second mortgage, executed by your orator to secure its bonds which are now outstanding to the aggregate amount of $25,000,000 in the hands of various persons who hold the same for value; that said mortgage is subject to

prior liens and mortgages covering the property of your
278 orator and securing outstanding indebtedness aggregating nearly $26,000,000.

That the said rates, tariffs and classifications were not established by said commission fairly, nor in the method prescribed by said act of April 3, 1891, nor upon due notice and hearing, nor in accordance with the evidence showing and information given afforded and available to the commission. That the said rates, charges and classifications were unreasonable, unjust and confiscatory, and would operate, if adopted by your orator, to reduce its earnings in a sum exceeding $250,000 per annum, and to impair and diminish the earning capacity, and, hence, the value of its property pledged to secure said second-mortgage bonds, and to destroy the property and interests of said Mercantile Trust Company, as trustee, and of the beneficiaries of its trust, and to take the same without due process of law, and to deny to your orator and to the said Mercantile Trust Company, as trustee, and to the bondholders represented by it the equal protection of the laws. That the enforcement of said rates would prevent your orator from earning the interest upon its said second-mortgage bonds, or any part of said interest, and that the same would destroy the ability of your orator to earn the interest upon prior obligations, threaten default and foreclosure of prior liens, and sale of your orator's railroad and property, which would not then bring, and, by reason of its diminished earning capacity, would not be worth, a sum equal to said prior obligations. That the rates, charges, tariffs and rules of the commission are made, by said act, conclusive in all cases except in a direct proceeding to test the reasonableness thereof to be instituted in a court of competent jurisdiction in Travis county, Texas, and that multiplied and excessive fines and penalties are denounced by said act for any violation of any order of the commission or departure from the rates, charges and tariffs prescribed by the commission. That by reason of the fact that your orator would be, by the operation of said act, remediless and without defense in proceedings against it for
279 such multiplied and excessive fines and penalties, and for alleged damages in case it disregarded the unreasonable rates, tariffs and orders of the commission, your orator had feared to refuse and had declined to refuse to adopt and enforce, and had already adopted and proposed further to adopt and enforce, the said unreasonable, unfair and unjust tariffs, charges and rates, and that defendants Reagan, McLean and Foster, claiming to act as such commission, and defendant Culberson, claiming to act as the attorney general of Texas, claim the right and threaten to exercise the powers purporting to be conferred upon them by said commission act in respect to the enforcement of the rates of the commission and the penalties for departure from said unreasonable and unjust tariffs established by it.

Complainant, in and by said bill of complaint, prayed for a decree cancelling and annulling the tariffs already established by the commission and restraining it from issuing further tariffs, and restraining your orator from adopting or enforcing said tariffs, and

enjoining the institution of suits and proceedings against your orator for alleged violation of said tariffs and orders of the commission. Complainant filed with its said bill of complaint, as exhibits thereto, copy of the said second mortgage of your orator to complainant as trustee, copies of the schedules, tariffs and circulars established and published by the commission prior to the filing of the bill, and a copy of said act of the legislature of Texas, approved April 3, 1891. For the full terms, statements, allegations and prayer of said bill, and for the full terms and contents of said exhibits, your orator refers to the said bill and exhibits respectively, with the same effect as if they were herein incorporated and set out.

Your orator files herewith its answer to said original bill of complaint, substantially admitting (as it could not deny) the allegations thereof; and now, to the end that it may represent to the court its own rights and interests, and those of its stockholders, in the premises, and may have the redress and relief to which it and they
280 are entitled, it exhibits (with leave of court, as aforesaid) this its cross-bill of complaint, and further shows to the court as follows:

Second. Your orator avers that in addition to its bonded indebtedness alleged in the complaint, it has lawfully issued for value, and there is now outstanding, its capital stock to the amount of $38,710,900, out of an authorized capital of $50,000,000. That its said bonds and stock were issued in the manner and for the objects prescribed and authorized by its charter, and the same represents a part of the cost to your orator of its railroad, property and equipment, and of the renewal, replacement, improvement, betterment and extension thereof, and represent the fair value of said property. That your orator has laid out and expended large sums of money upon the betterment and equipment of its said property not represented by bond or stock capitalization, and your orator has devoted a large proportion of the earnings of said railroad and property to the improvement thereof in order to put the same in the best attainable condition and to afford the best facilities and service to the public. That for many years last past all the earnings of the said railroad and property, except a sufficient amount thereof to provide for the interest on the first mortgages and liens upon your orator's property, have been required for and have been applied to the payment of the operating expenses and to the repair, renewal, improvement and equipment thereof. That the stockholders of your orator have never received any dividend or return whatever for or upon their investment or stock; but, on the contrary, said stockholders were, in the year 1886, called upon and compelled to contribute ten per cent. of the capital stock of the company then outstanding—an amount aggregating about three millions of dollars—for the purpose of meeting and providing for the expense of the improvement, betterment and reconstruction of said railroad and property. The only amounts which your orator has been able, dur-
ing the years subsequent to 1886, to apply as annual interest
281 upon the capital invested in your orator's property is the

said amount paid as interest upon your orator's first mortgages and liens outstanding, to wit, a sum equal only to five per cent. upon about $17,200 per mile of the railroad operated by your orator. That, notwithstanding the inadequacy of your orator's earnings to provide a fair and reasonable return upon the capital invested in or the value of your orator's property, and notwithstanding the rates and charges for transportation in force upon your orator's railway at the time the commission was established, were, as your orator now alleges the fact to be, very low and inadequate; and notwithstanding these conditions were represented to and were known to the commission, and naught to the contrary thereof appeared, said commission, without warrant or justification, proceeded to establish the reduced unreasonable and unjust tariffs and regulations set forth in Exhibit C to the complaint, and has undertaken to require, and claims the right to require, conformity therewith on the part of your orator. Your orator here adopts and specially avers the statements and allegations contained in the seventh article or paragraph of the original bill of complaint herein, and avers that the same are in all respects true.

Third. Your orator admits and here avers all of the allegations contained in the eighth, ninth, tenth and eleventh paragraphs of the said original bill of complaint of the Mercantile Trust Company, and asks that said allegations shall be deemed and taken to be by it made as if herein incorporated; except that your orator, referring to the allegations contained in the bill of complaint, purporting to state the diminution and reduction in its revenues which would be consequent upon the adoption and enforcement of the rates and tariffs promulgated by the railroad commission, avers that such diminution and reduction have exceeded, and will exceed, the estimates and statements so alleged; and in this behalf your orator avers that the loss in revenue which it has sustained by reason of the operation of the said rates and tariffs of the said railroad commission during the months of September, October, November and December, 1891, and January, February and March, 1892, have already reached the aggregate sum of $212,721.61, and that these losses are almost wholly losses in net revenue.

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Your orator avers that its revenues upon substantially all interstate business are absolutely controlled by the rates established by said commission and in force for transportation within the State of Texas and from interior Texas points to Galveston, and such interstate rates therefore are practically established by the said commission to the same extent as if interstate shipments were by law subject to the control of that body. The allegations in this behalf contained in the eleventh paragraph of the original bill of complaint herein are here particularly referred to, adopted and reaverred.

Fourth. Your orator here adopts and avers all of the allegations contained in paragraph 12 of the original bill of complaint of the Mercantile Trust Company, and states that the same are true.

Your orator avers that by circular No. 34, established and published by the said railroad commission, included in Exhibit C to

the original bill of complaint, the commission undertakes, upon the demand of the owner of any freight or property contained in any car owned by your orator, or in its possession, to surrender and deliver said car to other railroad companies whose lines connect with those of your orator, to be used by said other railroad companies upon its own lines and connections in the transportation of the property contained in said car to any place off the line of your orator's railway designated by the owner of said property or freight. That under the terms of said circular the cars of your orator may be taken from its possession and used as above stated, without its consent, without adequate compensation, and without other compensation for use thereof while off your orator's lines and out of its possession than a rental fixed by the commission covering the period of such enforced bailment, and without any security for the
283 safe or prompt return of said car or indemnity against damage or injury which may be done thereto.

Said circular further requires your orator, upon the tender to it of any car containing freight or property for transportation, and demand of the owner of such freight or property, or upon the demand of any railway company having such car in its possession, to receive the same for transportation, to any point on or beyond its own line which the owner of such freight or property may designate, and to pay to the railway company or person or corporation owning the car a mileage rate for every mile which said car may—under the direction of the owner of the freight therein, or of the said railway company tendering said car—be hauled over your orator's railway, although your orator owns and possesses a large number of cars for the transportation of property received by it as a common carrier, and has, except during rare seasons of extraordinary business activity, a sufficient number of idle cars available for such use. And said circular further requires that, after such car has been transported to the point designated by the owner of the freight contained therein, the same shall be returned and rehauled by your orator over its railway and be redelivered to the company from which it was received without any compensation whatever for such carriage and service.

And said circular further requires your orator to perform without compensation or reward any necessary switching service in receiving from or delivering to any connecting railway line such car.

Your orator submits that in the respects above recited, your orator is, and would be by said order and circular, and by the requirements of the commission therein contained, deprived of its property without due process of law, and not in due course of law, contrary to section 1 of article 14 of the amendments of the Constitution of the United States, and of sections 17 and 19 of article 1 of the constitution of the State of Texas.

That the effect and operation, and as your orator is informed and verily believes, the purpose of said circular is among other
284 things the regulation of commerce between the State of Texas and other States and foreign countries, and the regulation of the rates of transportation of shipments of an interstate character,

by permitting the interruption of such commerce and shipments at points within the State of Texas in such a way that a point intermediate between the real points of origin and destination of the shipments may be fixed as point of temporary destination, and the shipment rebilled from the latter point to its actual and final destination,—the shipment in the State of Texas, between this temporary point and the actual and real point of origin or destination, taking the rate established by the said commission and not the through interstate rate established under and in accordance with the Constitution and laws of the United States.

In this respect, your orator shows that said order, rate and rule, so announced and published as said circular No. 34, and said act of the legislature of the State of Texas, purporting to confer upon said railroad commission power and authority to make, announce and enforce said order, rate and rule, are invalid and void, because in conflict with and in violation of section 8 of article 1 of the Constitution of the United States, and an act of Congress of the United States, entitled "An act to regulate commerce," approved February 4, 1887, and the amendments thereto.

Fifth. Your orator here adopts and avers all of the allegations contained in the fourteenth paragraph of said original bill of complaint of the Mercantile Trust Company, and shows that in section 5 of said act of the legislature of Texas, establishing the said railroad commission, it is provided that in actions between private parties and railway companies, brought under said law, the rates, charges, orders, rules, regulations, and classifications prescribed by said commission before the institution of such action shall be held conclusive and deemed and accepted to be reasonable, fair, and just, and in such respects shall not be controverted therein until finally found otherwise in a direct action brought for that purpose in the manner prescribed by sections 6 and 7 of said act. So that
285 your orator alleges that, unless the relief herein sought be granted, its failure to adopt and put into effect and use the unreasonably low and uncompensatory rates heretofore prescribed by said commission would subject it to a multiplicity of suits brought by shippers for the penalties provided in section 17 of said act; and that in such suits it would be deprived of the lawful defense that the rates and charges so prescribed by said commission were and are unreasonable; and, so concluded and deprived of lawful defense, it would be subjected to innumerable penalties, ranging from $125 to $500, in each case, and would be thereby denied the equal protection of the laws and be deprived of its property without due process of law, and in a proceeding wherein its liability was fixed in advance, contrary to the Constitution and laws of the United States and to the constitution and laws of the State of Texas. Your orator furthermore alleges that in such suits by individual shippers it would be deprived of the right to a trial by jury of the issue involved in the said lawful defense, that said rates and charges were and are unreasonable, and that such deprivation of said right is and would be contrary to section 15, article 1 of the constitution of the State of Texas.

Your orator avers that section 6 of said act provides, that any railroad company or other party at interest, dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the commission, may file a petition setting forth the particular cause or causes of objection to such decision, rule, etc., in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant; and section 7 provides, that in all trials under section 6 the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to them. Said sections 6 and 7 provide the only contingency (except in suits on behalf of the State for penalties) in which railway companies may contest or controvert the reasonableness of a rate announced by the
286 commission, and the effect of said act (except as to such suits on behalf of the State) is to withdraw wholly from all railway companies subject to the operation of the act, including your orator, the right to make the defense that any charges, regulations or classifications of the commission are unreasonable, and (with said exceptions) limits the making of that issue to an affirmative proceeding directly instituted for that purpose in a single local court, wherein the burden of proof is fixed as above recited; and the effect of said act is to deprive railway companies subject to the operation thereof of the right to make a lawful defense under and subject to settled rules of evidence in any proceeding which may be instituted by individuals against it, thereby taking the property of said railway companies without due process of law, and denying to them the equal protection of the laws, contrary to the Constitution and laws of the United States, and especially section 1 of article 14 of the amendments to said Constitution, and to the constitution and laws of the State of Texas, and especially to sections 3 and 19 of article 1 of said constitution of Texas.

Your orator further alleges that the defense that any rate or charge is unreasonable cannot, under the provisions of said act, be made in any such suit by individuals until said court of Travis county has found that such rate or charge is not reasonable, fair or just; and the effect of said act in this respect is that upon such finding by the Travis county court the defense that such rate is unreasonable, unfair or unjust, may only thereafter be made in suits instituted by individual shippers, so that, as your orator shows, the operation of said act is to deny the right to make such defense in such suits, by individual shippers, until there has been an adjudication upon such issue in a suit between other parties in the tribunal of Travis county, and thus the practical effect of said act is to deny the right of railway companies to make a lawful defense, pending the institution by said railway companies in a different tribunal and against other parties, of a suit for the purpose of
287 directly making the issue involved in said defense, and of making such issue under the adverse conditions and the extraordinary and arbitrary presumptions and rules of evidence established by section 7 of said act. In the meantime innumerable judg-

ments may be recovered in suits by individuals, and said act provides no relief against such judgments, notwithstanding the said tribunal of Travis county may subsequently declare the rates and charges, for the violation of which said judgments of individuals may have been procured, were unfair, unreasonable and unjust.

Moreover, your orator, as it is advised and believes, alleges that the right pretended to be conferred by said act, of contesting in a court of competent jurisdiction of Travis county the reasonableness, fairness or justness of any rate, charge or act of the said commission, is without effect and without value to the railway companies or persons interested in the railways and properties subject to the operation of said act; for, as your orator is further advised and alleges, under the constitution of the State of Texas establishing the judicial system of said State and defining the jurisdiction of the several courts, there exists in Travis county no court of competent jurisdiction in the premises. And in this behalf your orator further alleges that the constitution of the State of Texas (article V) prescribes a complete judicial system for said State, and the legislature of the State of Texas is without power or authority to add to or take from the jurisdiction of the several courts of said State, as defined by said constitution, or to create or constitute any court or judicial tribunal, or to invest any court created under or by virtue of the constitution of the State of Texas, or any body or tribunal constituted by the legislative act, with any judicial powers or jurisdiction whatever. And your orator avers that under the limitations of jurisdiction prescribed by the said constitution of the State of Texas the courts of Travis county, in said State, and each and all of them, are wholly without jurisdiction and judicial power to entertain the petition of any railroad company or other
288 party dissatisfied with the decision of rates, charges, etc., as provided in section 6 of said act of April 3, 1891, and said courts, and each and all of them, are without jurisdiction and judicial power to determine or adjudicate any of the matters purporting to be committed to them, or either of them, by said sections 6 and 7 of said act.

Your orator shows that, even if it should be held that a court of Travis county would have jurisdiction of such an action, the remedy provided thereby would be wholly inadequate, if, pending the litigation, the tariffs of said commission should be enforced, as provided in said act. And your orator shows that, under the practice of the State of Texas, the trial of such an action and appeal therein may be extended over a long period of time, and that a final and conclusive adjudication upon the reasonableness and justness of rates may not be obtained in a less time than one year from the institution of such an action, during which time your orator would suffer great and irreparable loss and injury under the enforcement of said tariffs or penalties, inasmuch as no provision is made in and by said act for restitution, in the event that it shall be finally held that the tariffs of said commission, of any of them, are unjust and unreasonable.

Sixth. Your orator avers that under the Constitution and laws of

the United States and its said congressional charter, it has the constitutional and lawful right to sue and be sued in the circuit courts of the United States in and for the State of Texas in all cases whatsoever affecting its chartered rights, power or franchises, and in respect of the reasonable character of its charges for transportation of persons and property; and it is advised, and so avers and charges, that the said act of the Texas legislature of April 3, 1891, is, as respects your orator, and if applied to it, unconstitutional and void, since it undertakes to deprive your orator, and, if applicable to and applied to your orator, will deprive it of its constitutional and lawful right in that behalf; and sections 5, 6 and 7 of said act of April 3, 1891, if applicable to your orator and applied to
289 it are unconstitutional and void because said sections undertake to deprive your orator of the right to have the said Federal courts determine the said actions provided for in said sections, and provides that said actions shall be alone determined in the courts of the State of Texas; and section 6 of said act enacts that direct actions of the character therein provided for shall be exclusively tried in a court of the State of Texas, in the county of Travis, and confines the jurisdiction original and appellate of such actions to the courts of the State, and, contrary to the Constitution and laws of the United States and the law of the land, makes the rates, charges, orders, rules, regulations and classifications prescribed by the commission conclusive in all cases, until finally found to be otherwise in a direct action brought by your orator in said court of Travis county, and which, under the terms of said act can be brought by your orator in no other court, thereby depriving your orator of its lawful and constitutional right to have any action or controversy with private parties as to the reasonableness of its charges and rates for transportation heard and determined in the said Federal courts, and of its constitutional and lawful right to have such action or controversy determined by the laws of the land, and of the equal protection of the laws, contrary to the Constitution and laws of the United States.

Seventh. Your orator further avers that the penalties denounced by said act of April 3, 1891, for failure to comply with any of the provisions thereof, or with any of the rules, regulations, charges or rates prescribed and fixed by said commission, are wholly immoderate, unreasonable and excessive, and bear no just relation to the causes or matters with respect to which they are denounced, and that said excessive penalties are, as your orator verily believes, prescribed by said act with the view and intention that the same shall operate as a threat and menace to it and to other railway companies subject to the operation of said act, to the end that they may
290 be thereby compelled and coerced into the adoption of the rates and charges prescribed by said commission, whether or not the same shall be reasonable, fair and just. That the enforcement of the multiplied and excessive penalties prescribed by said act would result in serious loss and damage, and possible bankruptcy to railway companies subjected thereto, and the operation of said act in this respect is harsh, unreasonable and confiscatory, and

your orator avers that said act constituting said railroad commission is, in this respect, contrary to and in violation of the constitution of the State of Texas.

Eighth. Your orator shows that under the fear and apprehension of the excessive, immoderate and multiplied fines, penalties and damages denounced and provided for in said act, and by reason of the innumerable suits therein and thereby authorized and provided for, and the vast cost and expense attending the defence thereof, and notwithstanding that it believes and here avers that the tariffs, charges and orders established by said commission are unfair, unjust and unreasonable, and notwithstanding your orator claims that the same cannot be made lawfully applicable to it, it has, under protest, put the same into effect upon its lines of railway except as to the said commission's commodity tariffs numbers 13, 15, 17, 18, 19, 20 and 21, which said last-mentioned tariffs would not only be destructive of the revenues of your orator, but would in great part, if not in whole, if enforced by it, operate as conditions and restrictions upon its interstate traffic, and as conditions upon business which was designed to have, and would otherwise have, the character of interstate commerce.

Ninth. Your orator here adopts and avers all of the allegations contained in paragraph thirteenth of the original bill of the Mercantile Trust Company; and shows that it was chartered by an act of congress of the United States, approved March 3d, 1871, and by the several acts of Congress supplemental thereto and amendatory thereof, which said acts of Congress was adopted under
291 the powers vested in that body by the Constitution of the United States, including the power to regulate commerce between the States and to establish post roads; and your orator was so incorporated for the purpose of building, acquiring and operating lines of interstate railway, and as an agency and instrumentality of interstate commerce and business, and with power and lawful capacity to regulate its own business, including its rates and charges for transportation, in any matter not inconsistent with the laws of the United States and the provisions of its charter; and your orator says that the only condition and limitation upon its right and lawful authority to fix and regulate the rates and charges for transportation upon its own lines of railway are that your orator is by its said charter prohibited from charging greater rates per mile for carrying passengers and freight than the prices which might be fixed by Congress for carrying passengers and freight upon the Union Pacific and Central Pacific railroads.

Your orator here particularly refers to section 15 of said act of congress of March 3d, 1871, and shows that in and by said section and by said charter the ultimate power to establish, control and regulate its rates and charges for the transportation of freight and passengers is exclusively reserved to and vested in the Congress of the United States.

Section 18 of the act of July 1st, 1862, constituting the charter of the Union Pacific Railroad Company, provides as follows:

"And be it further enacted that, whenever it appears that the

net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States after deducting all expenditures, including repairs and the furnishing, running and managing of said road, shall exceed ten per centum upon its costs, exclusive of the five per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law.

"And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particu-
292 larly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend or repeal this act."

And the act of Congress of July 2d, 1864, amendatory of said original act of July 1st, 1862, provides as follows:

"It is further provided, that should the Central Pacific Railroad Company of California complete their line to the eastern line of the State of California before the line of the Union Pacific Railroad Company shall have been extended westward so as to meet the line of said first-named company, said first-named company may extend their line of road eastward one hundred and fifty miles on the established route, so as to meet and connect with the line of the Union Pacific road, complying in all respects with the provisions and restrictions of this act as to said Union Pacific road, and, upon doing so, shall enjoy all the rights, privileges and benefits conferred by this act on said Union Pacific Railroad Company."

The nineteenth section of the said act of Congress of March 3d, 1871 (your orator's charter), provides as follows:

"That the Texas Pacific Railroad Company shall be, and it is hereby declared to be, a military and post road; and for the purpose of insuring the carrying of the mails, troops, munitions of war, supplies and stores of the United States, no act of the company, nor any law of any State or Territory, shall impede, delay, or prevent the said company from performing its obligations to the United States in that regard: Provided, that said road shall be subject to the use of the United States for postal, military and all other governmental services, at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service, and the Government shall at all times have the preference in the use of the same for the purpose aforesaid."

Your orator avers that the only body which may by law fix and establish or regulate the rates and charges for transportation
293 over the lines of railway of your orator, or which has revisory power or jurisdiction over and in respect to such rates and charges as may be fixed and established by your orator, is the Con-

gress of the United States. That this power and jurisdiction of the Congress is not concurrent with a like power in the legislature of any State or Territory, but is exclusive.

And therefore your orator avers and submits that it was not and is not competent for the legislature of the State of Texas, either by direct legislation or through the acts of any agency or instrumentality by it created, to fix and prescribe schedules of rates and classifications regulating its business; and that said commission was and is without power or lawful authority, and could not derive power or lawful authority from said act of April 3, 1891, or from any act of the legislature of the State of Texas, to fix or prescribe rates, charges or classifications for your orator, or to regulate the same. And your orator says that said act of the legislature of the State of Texas, in so far as it purports or is intended to affect it in the respects above recited, is inoperative and void, and that likewise inoperative and void are any acts, schedules, orders or regulations of said railroad commission in so far as they purport or are intended to affect your orator or its business; for, as your orator avers and submits, said act, acts, schedules, orders and regulations would operate to deprive your orator of rights conferred upon and vested in it by the act of Congress of the United States constituting its charter, and are, therefore, contrary to the Constitution and laws, and to said last-mentioned law, of the United States.

Your orator avers that its mortgage bonds and stock were made and issued by it lawfully and in accordance with the powers and limitations conferred and prescribed by its said congressional charter. That it was not and is not competent for the legislature of the State of Texas, directly or through any instrumentality by it created, to fix and establish rates or charges affecting or controlling its transportation of business, or through any such rates, charges
294 or regulations so attempted to be fixed and established, to affect or diminish its revenues or to affect or impair its ability to earn the interest upon the bonds, and dividends upon the stock so lawfully issued by it under said authority of the Congress of the United States; and therefore your orator avers that said act of April 3, 1891, and said commission's tariffs and regulations are, so far as they purport or are intended to apply to your orator and its business, void and inoperative because violative of the rights and exemptions secured to your orator by its said congressional charter.

Except as herein and hereby qualified your orator adopts and avers all the allegations contained in the said original bill of The Mercantile Trust Company, complainant, and asks that this averment be deemed and taken to be equivalent to the incorporation herein of all the said allegations, as so qualified, contained in said bill.

In consideration whereof, and for as much as your orator is remediless in the premises under the rules of common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, to the end, there-

fore, that the defendants hereinafter named may answer the several matters and things hereinbefore set forth as fully and particularly as if the same were herein again repeated and they were thereto interrogated; and that an injunction may issue out of this court restraining the said Reagan, McLean and Foster and the said Charles A. Culberson, and each of them, from instituting or authorizing or directing any others to institute any suit or suits, action or actions, against your orator for the recovery of any penalties under and by virtue of any of the provisions of the act of the legislature of Texas, approved April 3d, 1871, and restraining all other individuals, persons or corporations now or hereafter claiming any right under and by virtue of the said commission law or said tariffs or either of them or both combined, or under and by virtue of the said
295 tariffs or orders of the said commission or either of them, from bringing or instituting suit or suits against your orator for the recovery of any damages, overcharges, penalty or penalties under or by virtue of said commission law or any of its provisions, or under and by virtue of the said tariffs, orders or circulars of the said commission or any or either of them, or under and by virtue of the said commission law and the said tariffs, orders or circulars or any or either of them combined, and restraining the said railroad commission of Texas and said Reagen, McLean and Foster and each and all of them, from making, issuing or delivering to your orator, or causing to be promulgated, established or made effective against it, any further tariff or tariffs, circulars or orders, and from attempting so to do; and that in the meantime until the hearing hereof your orator may have a temporary restraining order embracing all of the relief herein prayed for, such restraining order to continue in force until the termination of the hearing for a writ of injunction, and that on final hearing of this cause it may have all injunctions herein prayed made perpetual, and that all tariffs, circulars and orders heretofore made and issued by said railroad commission of Texas or by said Reagan, McLean and Foster, acting or claiming to act as said railroad commission of Texas, and each of them, may be cancelled and declared to be null, void and of no effect by a decree of this court, and that a mandatory injunction may be issued to the said commission and said commissioners, and each of them, commanding them to recall and abolish the said tariffs, circulars and orders, and each of them; and that such orders and decrees as may be made under the original bill of complaint herein of the Mercantile Trust Company shall be adapted to the protection of your orator in respect of the matters herein alleged, and that your orator may have such further and other relief as this case may require as well as all costs. May it please your honors to grant unto your orator a writ or writs of subpœna to be issued out
of and under the seal of this honorable court, and directed
296 to the defendants The Mercantile Trust Company, The Railroad Commission of Texas, John H. Reagan, L. L. Foster and William P. McLean and Charles A. Culberson, commanding said defendants and each of them to appear in this court at some certain day to be therein named, and to answer the premises, but not under

oath (answer under oath being expressly waived), and abide by and perform such decree as may be rendered herein.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By GEO. J. GOULD,
First Vice-President.

[L. S.] Attest: C. E. SATTERLEE, *Sec'y.*

R. S. LOVETT,
Solicitor for Cross-complainant.

W. W. HOWE,
WINSLOW S. PIERCE,
Of Counsel.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

George J. Gould, being duly sworn, says that he is the first vice-president of The Texas and Pacific Railway Company, the complainant above named, and has been such first vice-president for a number of years past; that he has read the foregoing cross-bill and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; and, further, that the seal affixed to the said bill is the corporate seal of the complainant, and was affixed by him to said bill by authority of said complainant.

GEO. J. GOULD.

Sworn to and subscribed before me this 23d day of May, 1892.
E. A. JACKSON,
[L. S.] *Notary Public, New York County.*

297 In the Circuit Court of the United States, Western District of Texas, in the 5th Circuit, in Equity.

Original Bill.

THE MERCANTILE TRUST CO., Trustee, Complainants,
vs.
THE TEXAS & PACIFIC R'Y CO. and JOHN H. REAGAN *et al.*, Defendants. } No. —.

Cross-bill.

THE TEXAS & PACIFIC RAILWAY CO., Complainants,
vs.
THE MERCANTILE TRUST CO., Trustee, and JOHN H. REAGAN *et al.*, Defendants.

To the honorable judges of said court:

The Mercantile Trust Company, trustee, complainants in the above-entitled cause, now amends its original bill herein filed as follows, to wit:

First. By adding at the end of paragraph eighth the following words, viz:

"That there has been necessarily expended in cash in the construction and equipment of the lines of railway aforesaid, owned and operated by the Texas & Pacific R'y Co., more than $50,000.00 per mile of such road, and that the same could not be reconstructed and replaced for less than $30,000.00 per mile; that the lines of railway of the Texas & Pacific R'y Co. have at all times been operated as economically as possible, and that its operating expenses have at all times been as reasonable and low in amount as they could be made by economical and judicious management, and that it has not been possible for said company to operate said road for less than it has been operated; that for the year ending June 30th, 1891, there were employed by the Texas & Pacific Railway Co. 41 general officers who received during said year an average daily compensation of $7.02. Exclusive of
298 its general officers, its employees received during said year an average daily compensation of $2.09; and for the year ending June 30th, 1892, it had 42 general officers, who during said year received an average daily compensation of $7.05, and all its employees, excluding general officers, received during said year an average daily compensation of $2.12; that at all times the Texas & Pacific R'y Co. has secured the services of its officers and employees as cheaply as practicable and has employed no more than necessary, and that the above were fair and reasonable rates of pay; that at all times the Texas & Pacific R'y Co. has secured all supplies, material, and property of whatever character used in the operation of the road at the cheapest market price and at as low rates as the same could be secured, and has secured and used no more than was actually necessary in the operation of the road; that your orator files herewith, as parts of this bill of complaint, marked respectively Exhibits "H" & "I," copies of its sworn reports made by its officers to the railroad commission of Texas for the years ending respectively June 30th, 1891, and 1892, on the forms prescribed by said commission, which show its operating expenses in detail, each and every item of which was reasonable in amount and as low as practicable. Your orator alleges that the loss in revenue sustained by the Texas & Pacific R'y Co. by the observance and application of the first 10 tariffs established by the commission, being commodity tariffs 1 to 10, inclusive, as set forth in Exhibit "C" to this bill, from the respective dates upon which each of said tariffs took effect until the 31st day of July, 1892, amounted to $252,102.72; that this does not include loss in revenue to said railroad company arising from reduction in rates affected by the commission tariffs subsequent in number and date to commodity tariff No. 10, set
299 forth in said Exhibit "C;" that all of said tariffs in force would cause an annual loss of $400,000.00; that the tariffs established by the said railroad commission effected average reductions in the rates theretofore charged on the Texas & Pacific railway substantially as follows:

On wheat, average reduction	13	per cent.
Other grain	12.88	per cent.
Flour, meal, hominy, and grits	23	per cent.
Salt (car-loads)	12.50	per cent.
Hay	15	per cent.
Lumber, etc.	15	per cent.
Cotton seed	25	per cent.
Cotton-seed oil reduced, but effect nominal.		
Cotton-seed hulls reduced, but effect nominal.		
Cotton-seed meal and cake reduced, but effect nominal.		
Cotton	15	per cent.
Flour, L. C. L., local	26	per cent.
Gram, L. C. L., local	20	per cent.
Salt, L. C. L., local	55	per cent.
Flour, L. C. L., through	45	per cent.
Grain, L. C. L., through	49	per cent.
Salt, L. C. L., through	50	per cent.
Wood	38	per cent.
Coal, reduction, but effect nominal.		
Stone and sand	7	per cent.
Common brick	33	per cent.
Fire-brick	80	per cent.
Cement and plaster, reduction.		
Lime, C. L.	18	per cent.
Wool	5.50	per cent.
Pig-iron, reduction, but nominal.		
Scrap-iron	18	per cent.
Junk	37	per cent.
Iron fencing, C. L.	41.21	per cent.
Iron fencing, L. C. L.	51	per cent.
Iron roofing (car-loads)	46.21	per cent.
Iron roofing, L. C. L.	48.43	per cent.
Iron fencing, not otherwise specified, C. L.	60.95	per cent.
Iron fencing, not otherwise specified, L. C. L.	62.23	per cent.
Iron roofing and fencing in bundles, C. L.	60.95	per cent.
Iron roofing and fencing in bundles, L. C. L.	57.70	per cent.
Stock-cattle	38.54	per cent.
Beef cattle west of Fort Worth	30	per cent.
Beef cattle east of Fort Worth	16	per cent.
Calves, goats, sheep, hogs, L. C. L., single deck, west of Fort Worth	47.43	per cent.
Calves, goats, sheep, hogs, L. C. L., single deck, east of Fort Worth	37.97	
Calves, goats, sheep, hogs, L. C. L., double deck, west of Fort Worth	30	per cent.
Calves, goats, sheep, hogs, L. C. L., double deck, east of Fort Worth	16	per cent.
Horses and mules west of Fort Worth	34	per cent.
Horses and mules east of Fort Worth	37.87	per cent.
300 Average entire line, stock cattle	35	per cent.

Average entire line, beef cattle	35	per cent.
Average entire line, calves, goats, sheep, etc., single deck	30	per cent.
Average entire line, calves, goats, sheep, etc., double-deck cars	35	per cent.
Average reduction entire line, horses and mules	35	per cent.
Straw wrapping paper	21.78	per cent.
Manilla wrapping paper	41.81	per cent.
Straw	22.25	per cent.
Fire-brick, etc., by tariff No. 22	40	per cent.
Fruits, vegetables, etc., C. L.	48	per cent.
Fruits, vegetables, etc., L. C. L.	39	per cent.
Commodity tariff No. 24, cancelling No. 1, on flour, grain, meal, etc., further reduced the rates on these commodities beyond what is above shown, about	17	per cent.
Beer and ice, about	21	per cent.

These figures give the general result of the commission tariffs on the commodities named after taking into account the increase, if any, to certain points.

That the decrease in the Texas & Pacific Railway Company's rates and revenues made by said commission have not and will not cause any such increase in the tonnage or business of said company's road as will in any degree whatever make up or compensate for the loss in revenue caused by the reduction in said rates; that said Texas & Pacific Railway Co., before and during the period when said commission tariffs were in effect and now, charges as high passenger rates as are allowed by the laws of the State of Texas and derived and derives *and* the revenue possible from any and all other sources, including interstate and foreign traffic; that the divisions of through rates now and at all times heretofore enjoyed by the Texas & Pacific R'y Co. on interstate and foreign commerce moving over two or more lines has exceeded and does greatly exceed the divisions of through rates on shipments moving between points within the State of Texas which the Texas & Pacific R'y Co. did or could derive under the rates fixed by said commission—that is to say, for hauling the freight the same distance or performing the same service the Texas & Pacific Railway Co. received largely more revenue on business interchanged with interstate roads or on foreign or interstate business than it did or could receive on business interchanged under the rates of said commission with roads within the State and subject to the rates of the said commission, and that the Texas & Pacific Railway Company's interstate rates, as well as the interstate and foreign rates of all other lines doing an interstate and foreign business to and from Texas, now and at all times have been higher than the rates fixed for the same or corresponding distance by the said commission; that each and all of the tariffs issued by the Texas & Pacific R'y Co. putting into effect the rates of said commission were issued under protest, and there was printed thereon by the Texas & Pacific R'y Co. the words following, viz:

"This tariff is issued by order of the railroad commission of Texas under protest, and the right to contest the same in the courts is reserved."

Second. By adding at the end of paragraph 13 the following, viz:

Your orator represents that the said defendants, Reagan, McLean, Foster, and Culberson, are contending that the Texas &
301 Pacific Railway Company is bound by the act of April 3rd, 1891, and all other general laws of the State of Texas in reference to railroads constructed in said State by virtue of an act passed by the legislature of the State of Texas May 2nd, 1873, which subsequently became a law within the time prescribed by the constitution, entitled "An act to define and adjust the rights of the Texas & Pacific Railway Company within the State of Texas in order to encourage the speedy construction of a railway through the State to the Pacific ocean," by which said act the State of Texas, among other things, agreed to grant and donate to said Texas & Pacific Railway Company twenty sections of land of 640 acres each for every mile of its road completed in good substantial running order in the manner and upon the terms and to the points in said act provided, a copy of which said act is attached hereto and made a part hereof, marked "Exhibit D," for the full understanding of its terms and for that purpose only, and in consideration of said grant and donation it was provided in said act, among other things, that "the said Texas & Pacific Railway Company shall be subjected to such general laws as may be enacted by the legislature applicable to other railroads constructed within this State," and by section 11 of which said act of May 2nd, 1873, it was provided "that said Texas & Pacific Railway Company, by their board of directors, shall within fifteen days from the date of the approval of this act signify to the governor, by telegraph or otherwise, an acceptance of rejection of the terms of this act, and within thirty days from the date of the approval of this act shall file a formal acceptance or rejection of the same with the secretary of state of the State of Texas;" that said defendants contend that your orator is so bound by said acts, because within the
302 time prescribed by said act the board of directors of said company signified to the governor, in the manner therein prescribed, an acceptance of the terms and conditions of said act, and, within the time therein prescribed filed with the secretary of state of the State of Texas a formal acceptance of the terms and conditions of said act; but your orator avers that such claim or contention on the part of the said defendants is untrue and not well founded for these reasons: That the charter of the Texas & Pacific Railway Co. (act of Congress approved March 3rd, 1871) provided, among other thing, as follows: "Sec. 4. That said Texas Pacific Railroad Co. shall have power and lawful authority to purchase the stock, land and grants, franchises, and appurtenances of, and consolidate on such terms as may be agreed upon between the parties with, any railroad company or companies heretofore chartered by congressional, State, or territorial authority on the rate prescribed in the

first section of this act, but no such consolidation shall be with any competing through lines of railroads to the Pacific ocean;" and section 6 of said act provided "that the rights, lands, land grants, franchises and appurtenances, and property of every description belonging to each of the consolidated or purchased railroad company or companies as herein provided shall vest in and become absolutely the property of the Texas Pacific Railroad Co.;" that the Southern Pacific Railroad Company was incorporated by act of the Texas legislature approved February 16th, 1852, and the Southern Transcontinental Railway Company was incorporated by an act of the Texas legislature approved July 27th, 1870. By an act of the Texas legislature approved May 24th, 1871, the Southern Pacific Railroad Company and the Southern Transcontinental Railway Co. were authorized to consolidate with the Texas Pacific Railroad Co., the provisions of this act in this respect being as follows: "Sec.
303 11. All the rights, benefits, and privileges granted and intended to be secured by this act to the Southern Pacific Railroad Co. and to the Southern Transcontinental Railway Co. shall pass to and vest in the Texas Pacific Railroad Co., a corporation created by and under the laws of the United States by an act of Congress approved March 3rd, A. D. 1871, whenever the said Southern Pacific Railroad Co. and the said Southern Transcontinental Railway Co. shall have been consolidated with the said Texas Pacific Railroad Co., and authority is hereby given the said Southern Pacific Railroad Co. and said Southern Transcontinental Railway Co. and the said Texas Pacific Railroad Co. to consolidate on such lawful terms and conditions as may be agreed upon between the said companies and be ratified by a majority of the stockholders of each of the corporations so consolidating, provided that the Texas Pacific Railroad Co. shall take no benefits whatever under or by virtue of this act until the said company shall have fully performed all the conditions imposed by this act upon the Southern Pacific Railroad Co. and the Southern Transcontinental Railway Co." A copy of said act is hereto attached, marked Exhibit "E," and a copy of the act amendatory thereof, passed Nov. 21, 1871, marked Exhibit "F," and prayed to be made a part of this bill; that, in pursuance of the powers thus expressed and of that power alone in so far as the State of Texas was concerned, the consolidation was effected; that at the time of the passage of the act of May 2nd, 1873, hereinbefore referred to as Exhibit "D," the consolidation had been actually effected and nothing remained to be done; that said consolidation had been effected by merger of the Southern Pacific Railroad Co. and the Southern Transcontinental Railway Co. into the Texas & Pacific Railroad Co. through delivery of deeds, whereby the said former companies sold and assigned unto the Texas &
304 Pacific Railway Co. all of their property, franchises, contracts, rights, privileges, etc., said deeds of consolidation and merger each containing this provision: "The object and purpose of this indenture being to consolidate the said corporations into one by the sale of the Southern Pacific Railroad Co. (in the one case and the Southern Transcontinental in the other) and all its prop-

erty, rights, and franchises into the said Texas Pacific Railroad Company, so that the two corporations thus consolidated in accordance with the laws under which they were created may become one by merging the said Southern Pacific Railroad Company (or the Southern Transcontinental) into the said Texas Pacific Railroad Company;" that all of the considerations upon which the consolidation was effected under the laws of Congress and of the State of Texas were fixed and established by the said act of the legislature of the State of Texas of May 24th, 1871, and by said deeds of merger, and that neither the act of the legislature of the State of Texas approved February 16th, 1852, incorporating the Southern Pacific Railroad Company, nor the act of said legislature approved July 27th, 1870, incorporating the Southern Transcontinental Railway Company, nor the act of said legislature approved May 24th, 1871, authorizing the consolidation and merger of said companies with and into the Texas Pacific Railroad Company, hereinbefore referred to, imposed any such restrictions and limitations requiring the Texas & Pacific Railroad Company to subject itself to the laws of the State of Texas and relinquish its Federal franchises and obligations, as was sought to be imposed upon it by the aforesaid act of the legislature of the State of Texas approved May 2nd, 1873, as hereinbefore set out as Exhibit "D" to this bill; that the power to consolidate, both under Federal and State legislation, had been exercised and exhausted when the act of
305 May 2nd, 1873, was adopted, and said consolidation, as above set forth, had been fully effected and completed; that the act of May 2nd, 1873, not only recited the consolidation, but recognized it as an accomplished fact and dealt with the rights of the Texas & Pacific Railroad Co. only as the assignee of the donations of the State to the two Texas companies which had been merged into it. Said act recites the power of the Texas companies to consolidate with the Texas & Pacific Railway Company, describing the latter as a corporation created by an act of the Congress of the United States, and further recites, "Whereas it appears from documentary evidence on file in the office of the secretary of state of the State of Texas that such consolidation has been effected, and as a difference of opinion may arise as to the construction of the acts of the legislature hereinbefore referred to in regard to the amount of lands to which said Texas & Pacific Railway Company may be entitled under the said acts of incorporation and other laws of this State; and whereas it is desirable that there should be a complete and final adjustment of the rights of said Texas & Pacific Railroad Company as the assignees and successor of the said Southern Pacific Railroad Company and the said Southern Transcontinental Railway Company under the laws of this State and a definite understanding as to the obligations of the State, and to the further end that said company be encouraged to a speedy construction of said railway," etc., thus in express terms fully recognizing and ratifying said consolidation; that by the aforesaid acts creating and incorporating the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company and by an act en-

titled "An act to encourage a speedy construction of a railway through the State of Texas to the Pacific ocean," passed May 24th, 1871, and by an act amendatory thereof, passed November 21st, 1871, the State of Texas granted to and conferred upon said
306 companies and the Texas & Pacific Railway Company, for the consideration and inducement in said act specified, the bonds of the State of Texas of the denomination of $1,000.00 each, payable to said companies or bearer in 30 years from the date thereof, with interest at the rate of 8% per annum, payable semi-annually, to the amount of $6,000,000.00 in all, with the right reserved to the State of Texas to substitute for said bonds a grant of public lands to said company to the amount of 24 sections of land of 640 acres each for each mile of road built by the said company; all the rights and benefits granted by the State of Texas by virtue of these acts had become vested in the Texas & Pacific Railway Company, and all conditions and requirements thereof had been complied with by the Texas & Pacific Railway Company before the passage of — May 2nd, 1873, hereinbefore referred to and set out as "Exhibit D," and by said act of May 2nd, 1873, the Texas & Pacific Railway Company not only acquired no additional benefits or donations, but the donations, the title to which had actually vested in it under the previous consolidation, were cut down and limited by eliminating the grant of bonds and reducing by 4 sections the alternative or substituted grant of lands; that at the date of the passage of said act of May 2nd, 1873, the Texas & Pacific Railway Company did not receive nor has it at any time since received the money or the lands in lieu of the money promised it by the State of Texas, except twenty sections of land of 640 acres each for 402 miles of road constructed, completed, and equipped by it according to the terms of said act, and although said company has since the passage of said act of May 2nd, 1873, constructed, completed, and fully equipped in accordance with the requirements and terms of said act more than 650 miles of its railway in addition to the 402 miles before mentioned, yet the
307 Texas & Pacific Railway Company has not received the twenty sections of land of 640 acres each for every mile of road so constructed and completed, and the State of Texas has undertaken to repeal all laws under and by virtue of which said lands could be acquired, including the said act of May 2nd, 1873, and has by general laws withdrawn all its lands from location or appropriation by said railway company out of which said donation or grant could have been satisfied, which general laws are here referred to; that the said act of May 2nd, 1873, had no part whatever in fixing the terms of the consolidation and merger of said Texas corporations with and into the Texas & Pacific Railway Company, and that said act has never received the sanction of Congress, either express or implied; that by an act approved June 22nd, 1874, amending and supplementing the acts theretofore passed creating the Texas & Pacific Railway Company by the consolidation of the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company with and merger into the Texas & Pacific

Railway Company, as accomplished under the aforesaid act of the State of Texas of May 24th, 1871, the Congress of the United States expressly recognized and limited such consolidation by the following provision in said act: "And such mortgages for the division east of Fort Worth shall embrace the roads and property of the Southern Pacific Railroad Company and of the Southern Transcontinental Railway Company, heretofore merged in and consolidated with said Texas & Pacific Railway Company under the authority and requirements of the laws of the State of Texas, and each road so merged as aforesaid shall for that and all other purposes be deemed and taken to be a part of said Texas & Pacific railway and shall hereafter be subject to all the provisions and limitations of the act of Congress incorporating said com-
308 pany and all the supplements thereto." Thus by the terms of said act Congress reserved and retained unto itself and excluded on the part of the State all rights and powers established by the provisions and limitations of the act of Congress incorporating said company and the supplements thereto; that Congress has never in any manner sanctioned or consented to the subjection of said railway company to the general laws or to any other laws of the State of Texas, but has, as aforesaid, distinctly enacted to the contrary; that if said act of 1873 or any other legislation of the State of Texas can be construed as a contract by said company to substitute the sovereignty of the State for that of the United States over said company the same is in such event *ultra vires*, contrary to the public policy of the United States, null and void, and said nullity for the reasons aforesaid is hereby specially pleaded and urged.

Second. By adding at the end of paragraph 13 the following words, viz:

"13*b*. That on or about the 7th day of February, 1854, the legislature of the State of Texas passed an act, which was duly approved by the governor, which, among other things, provided:

SEC. 1. Be it enacted, etc., That all railroad companies which have been heretofore incorporated, or which shall hereafter be incorporated, or relieved from the performance of any act required of them, or which shall accept of any donation or loan from this State, or which shall accept of the subscription of any county of this State, shall have all the powers and privileges, and be subject to all the duties, liabilities and provisons contained in this act.

SEC. 15. It shall be lawful for the legislature at any time to prescribe the rates to be charged for the transportation of persons and property upon any such road should they be deemed to high, and may exercise the same power every ten years; provided that
309 no reductions shall be made unless the net pofits of the company for the previous ten years, the expenditures of the company being *bona fide*, and not with a view to defeat the operation of this section, shall amount to a sum equal to 12 per centum per annum upon its capital stock, and then so as not to reduce the future probable profits below the said per centum."

That, as aforesaid, the Texas & Pacific R'y Co. was incorporated

and all of its railway, except about 500 miles lying west of Ft. Worth, was constructed while said act was in effect, the same not having been repealed until the year 1879, when it was omitted by the commissioners when they compiled the Revised Civil Statutes of the State of Texas; that the said act was never expressly repealed by the legislature of the State of Texas, and if ever repealed it was only repealed by implication by the adoption by the legislature of the statutes as revised by the said commissioners.

Third. Complainant reiterates each and every allegation in its original bill of complaint and prays the court to allow this amendment to be filed; and your orator prays as in its original bill prayed and prays for all other and further orders and equitable relief in the premises.

FARRAR, JONAS & KRUTTSCHNITT,
ALEXANDER & GREEN,
Solicitors for Complainant.

JNO. F. DILLON,
JNO. J. McCOOK,
E. B. KRUTTSCHNITT,
Of Counsel.

310 An act to adjust and define the rights of the Texas and Pacific Railway Company within the State of Texas in order to encourage the speedy construction of a railway through the State to the Pacific ocean.

Whereas, by the terms and conditions of an act entitled "An act to encourage the speedy construction of a railway through Texas to the Pacific ocean," passed May 24th, 1871, and an act supplementary and amendatory thereto passed November 25th, 1871, authority was given to the Southern Transcontinental Railway Company, and to the Southern Pacific Railroad Company, incorporations created by the acts of the legislature of the State of Texas, to become consolidated with the Texas Pacific Railroad Company, an incorporation created by an act of the Congress of the United States; and

Whereas, it appears, from documentary evidence on file in the office of the secretary of state of the State of Texas, that such consolidation has been effected, and as a difference of opinion may arise as to the construction of the acts of the legislature hereinbefore referred to, in regard to the amount of lands to which said Texas & Pacific Railway Company may be entitled under the said acts of incorporation, and other laws of the State; and

Whereas, it is desirable that there should be a complete and final adjustment of the rights of said Texas and Pacific Railway Company, as the assignee and successor of the said Southern Pacific Railroad Company and the said Southern Transcontinental Railway Company under the laws of this State; and a definitive understanding as to the obligations of the State; and to the further end that said company be encouraged to the speedy construction of said railway, therefore

SEC. 1. Be it enacted by the legislature of the State of Texas, That

the Texas and Pacific Railway Company, a corporation created by an act of the Congress of the United States, as the successor of the Southern Transcontinental Railway Company, a corporation created by an act of the legislature of the State of Texas, approved July 27th, 1870, shall construct its road from the town of Marshall, in Harrison county, to the city of Jefferson, thence in a northerly direction to a point in Bowie county, not exceeding six miles west from Texarkana at which point to intersect with its main line, which shall be constructed from or near Texarkana, on the Arkansas line, through the towns of Clarksville, Paris, Honey Grove, Bonham, and Sherman, by the first day of July, 1874; thence through the towns of Pilot Point and Denton to the point of junction with the Southern Pacific railroad line at Fort Worth, by the first day of January, A. D. 1875; and shall erect passenger and freight depots within one mile of the business portions of said towns; provided, said towns, respectively, shall donate to said company the necessary lands for right of way, side tracks, switches, and depot buildings, not to exceed in each case twenty acres; provided, that said depots shall be erected at the towns of Bonham, Sherman, Pilot Point, and Denton, upon the grounds now agreed upon and donated to said railroad company by said towns. And provided further, that said railroad company shall commence the grading of their railroad in the county of Denton within ninety days from the passage of this act, and shall continuously prosecute the same until the said road shall be graded between the towns of Sherman and Fort Worth.

311 And the said Texas and Pacific Railway Company, as the successor of the Southern Pacific Railroad Company, a corporation created by the laws of the State of Texas, shall construct its road from its present western terminus at Longview, in Upshur county, as now located through the town of Dallas, to the point of junction at Fort Worth, by the first day of July, 1874; and said Texas and Pacific Railway Company shall construct a single-track railroad from the said point of junction at Fort Worth, westwardly, on the most practicable route to a point not less than one-fourth nor more than one-half mile from the court-house in the town of Weatherford, in Parker county, at which point said company shall establish and maintain a freight and passenger depot: Provided, it shall not be obligatory upon said company to go by said town and establish said depot, in the event the said town of Weatherford fails to give said company, free of charge, twenty-five acres of land, the same to be designated by the said company, for the purpose of depot buildings, track, sidings, switches, and turnouts; and also give, free of charge, the right of way through the said town, and a track of twenty-five acres of land situated on the line of said railroad, and within one mile and a half of the court-house in said town; and then westwardly, on the most practicable route to the Rio Grande river, at a point in the county of El Paso, opposite the town of El Paso in Mexico; and said single-track railroad shall be constructed from the said point of junction at Fort Worth at the rate of one hundred miles per annum, until it reaches the Rio Grande river:

Provided, said road shall be completed and put in running order to the main line of the Transcontinental road near Texarkana, or from such point on said line as the railroad now being constructed from Little Rock, to a junction with said Transcontinental road, may cross the Arkansas State line, the same not being more than seven (7) miles north of Texarkana by January, 1874, and shall build and maintain a depot within one-half mile of the town of Clarksville, in Red River county.

SEC. 2. That the State of Texas hereby grants and donates to the said Texas and Pacific Railway Company twenty sections of land of six hundred and forty acres each for every mile of its road completed in good substantial running order in the State of Texas; that is to say, on the branch road from Marshall to Jefferson by August, 1873, and from Jefferson to the main line of the Southern Transcontinental road, in Bowie county, and from or near Texarkana, or to the point of junction of the Transcontinental road on the Arkansas State line, with the railroad now being constructed from Little Rock, thence to Fort Worth, and from Longview to Fort Worth, and from Fort Worth to the Rio Grande river, opposite El Paso, in Mexico: Provided, the said road shall be constructed from Marshall, by Jefferson, on the line hereinbefore designated, to Sherman, by the first day of July, 1874, and the grading be commenced in the county of Denton within ninety days from the passage of this act, and be continuously prosecuted until the said grade is finished between Sherman and Fort Worth, and the road completed and put in running order to Fort Worth, by the first day of January, 1875, and the road from Longview to Fort Worth shall be completed and put in running order by the first day of July, 1874, and the said track road westward from Fort Worth to the Rio Grande, after the first day of January, 1875, shall be constructed and put in running order at the rate of one hundred miles annually: And further provided, that should said company fail to complete either of its said lines within the manner and time hereinbefore prescribed, to the point of junction, it shall thereafter forfeit all right to any donation of land, or reservation of lands, except upon its completed road; and should said company fail to construct its single track westward from the point of junction at Fort Worth, in the time required, it shall forfeit all its rights to donations or reservations of land, except upon the portion thereof completed: Provided that in no case shall the State be in any way liable for deficiency of vacant domain.

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SEC. 3. That whenever and as often as said Texas and Pacific Railway Company shall complete and put in running order a section of ten miles or more of either line of its road, or of its single-track road, as hereinbefore designated, said company shall give notice thereof to the governor of the State, and it shall be his duty to appoint some skilful engineer, if there be no State engineer, to examine said completed road and to make report thereon, under oath, to him; it shall then be his duty, if the same is shown to have been constructed in accordance with its charter, and as required by law, to report the fact to the Commissioner of the General Land Office;

thereupon it shall be the duty of the Commissioner of the General Land Office, to issue to said company twenty certificates for six hundred and forty (640) acres of land for each and every mile of road so completed. That all land certificates that shall issue to said company, under the provisions of this act shall be located and surveyed in alternate sections—that is to say, said company shall cause to be surveyed two sections of six hundred and forty (640) acres each, for each certificate, adjoining, and shall return to the General Land Office the field-notes and maps of the same, and the Commissioner of the General Land Office shall thereupon number said sections so surveyed, and shall cause to be issued to said company, or its assignees, patents to the odd sections, the even sections being reserved to the State for the school fund: Provided, that when fractions of land of a less size than twelve hundred and eighty (1,280) acres by reason of previous surveys, are found, the same may be located, by virtue of said railroad certificates, in equal quantities; and it shall be the duty of the Commissioner of the General Land Office to designate the same as other railroad certificates, and to patent one-half thereof to the company, or its assignees, and one-half to the State, and the residue of said certificates may be, in like manner, located elsewhere, until the same is exhausted, the State being entitled to one-half of each survey and the company to the other half: Provided, that the grant of land herein made shall not be construed to give to said company a greater number of acres of land than the amount or number of acres computed as herein provided, for the number of miles of road within the State of Texas.

SEC. 4. That said company shall alienate the lands hereby granted and donated except so far as may be necessary for the ordinary uses and operating said road, as follows, viz: One-fourth thereof in eight years; one-fourth in twelve years; one-fourth in sixteen years; and the remaining fourth in twenty years from the date of the issuance of the certificates, in such a manner that the whole of such lands shall pass out of the hands of the company within twenty years after the date of the certificates. Provided, that said lands shall not be alienated to any other railroad corporation, except so far as may be necessary for the proper use and the conducting of
313 the business of such a corporation; nor to any person, firm, or company in trust for said railroad company, or to any company or firm of which any officer or stockholder of said railroad company is a member; and the violation of this provision shall work a forfeiture of the rights conferred by this act; and on failure to comply with the provisions of this section, and the general laws of the State on this subject, or a violation of the provisions of this section, or said general laws, the said company shall forfeit all right to lands secured by this act not alienated as required by law.

SEC. 5. That the public lands heretofore reserved from pre-emption, location and survey, for the benefit of the Memphis, El Paso and Pacific Railroad Company, in what is known as the Memphis, El Paso and Pacific Railroad reservation, and as designated by the maps, plats, and field-notes now on file in the General Land Office, commencing on the eastern boundary line of the State, in Bowie

county, and thence westwardly to the 23rd meridian of longitude west from Washington, are hereby continued to be reserved from pre-emption, location, or survey, by the holder of any land certificate or other land claim, for the benefit of the said Texas and Pacific Railway Company, and for the benefit of the school fund; and where the public lands therein have not already been sectionized, said company shall sectionize the same, and return the field-notes and maps to the General Land Office, as heretofore required, giving to the company the odd section, and to the school fund the even section; and said company is hereby authorized to apply any of the certificates, to which it may be entitled under the provisions of this act, to the odd section within said reservation: Provided, that nothing herein contained shall be so construed as to effect or impair the legal rights of third persons: And further provided, that this reservation shall continue in force until the first day of January, 1876, and no longer.

SEC. 6. That the said Memphis and El Paso reservation, from the twenty-third meridian of longitude west from Washington to the Rio Grande river, as designated by the field-notes, maps, and reports from the different surveyors of the several land districts of the State on file in the General Land Office, is hereby continued to be set aside and reserved from pre-emption, location, and survey for the benefit of the said Texas and Pacific Railway Company and the school fund; and there is also hereby set aside for the same purpose out of the public lands, such additional widths of territory on each side of the said sixteen miles of reservation as will make eighty miles in width from the twenty-third meridian of longitude west to the east boundary line of New Mexico, and to a point south of the southeast corner of said Territory of New Mexico; that is to say, taking the center line of said Memphis and El Paso reservation, and extending forty miles on either side thereof; and after reaching the said point south of, and opposite to the southeast corner of New Mexico, the said reservation of the unappropriated public domain is hereby continued eighty miles in width, extending westward to the Rio Grande, and bounded on the north by New Mexico; the same to include the Memphis and El Paso reservation hereinbefore mentioned, which said reservation, as herein continued and set apart shall continue to be so reserved and set apart for the purposes herein mentioned until the year 1880, and no longer; provided, that nothing in this section contained shall impair or affect the rights of any person or persons heretofore legally acquired within said reservations; and provided, that the State of Texas shall have the right to grant the right of way, not to exceed two hundred feet in width, to any other railroad company through or across
314 said reservation, so long as the fee remains in the State, and to cross and connect with the roads herein to be constructed.

SEC. 7. The Commissioner of the General Land Office shall designate, upon the maps of his office, the reservations herein continued and created—from the twenty-third meridian of longitude west from Washington to the Rio Grande river.

SEC. 8. That the certificates of land to which said Texas and Pa-

cific Railway Company may be entitled under the provisions of this act, shall be located within the reservations hereinbefore continued and located, except one thousand certificates, of six hundred and forty (640) acres each, to be issued to said company by the Commissioner of the General Land Office upon such portion of completed road as it may designate, and which certificates may be located upon any of the public domain of this State, subject to location not included within said reservations. And provided further, that in case there is not a sufficient quantity of unappropriated public lands within said reservations to satisfy the remainder of the certificates to which said company may be entitled, within the corresponding sections belonging to the school fund, then and in that event said company shall have the right to locate the balance of said certificates, with the corresponding school fund, upon any of the unappropriated public domain of the State subject to location. Provided, that the State of Texas shall not be held responsible for any deficit of public lands upon which to locate said certificates; and no land certificate issued under the provision of this act, which may not be located by reason of the exhaustion of the public domain, shall ever constitute any claim against the State.

SEC. 9. That the above grants, donations, and reservations, are made to the said Texas & Pacific Railway Company, a corporation created by an act of the Congress of the United States, approved March 3rd, 1871, as the assignee of and successor to the rights, privileges and franchises of the Southern Transcontinental and the Southern Pacific Railroad Companies, corporations created by the laws of Texas, with the intent and the distinct understanding that the same shall be accepted by said Texas and Pacific Railway Company in full satisfaction of any claims for money, bonds, or lands, to which said company might be entitled under the act entitled "An act to encourage the speedy construction of a railway through the State of Texas to the Pacific ocean," passed May 24th, 1871, and an "Act amendatory and supplementary thereto," passed November 25th, 1871, or by virtue of the consolidation of said Texas and Pacific Railway Company with the Southern Transcontinental Railway Company and the Southern Pacific Railway Company, or by virtue of the charters of either of said railroad companies, or by virtue of any railroad franchise granted by the State of Texas, purchased or acquired by either of said companies, or by the Texas and Pacific Railway Company, or by virtue of any general or special law of this State, and in full satisfaction of all claims or demands for bonds, lands, or money of said Southern Pacific and Southern Transcontinental Railroad Companies against the State of Texas; and said Texas and Pacific Railway Company shall be subject to such general laws as may be enacted by the legislature applicable to other railroads constructed within this State; and that all the property of the said corporations, or either of them, now or hereafter, situated in this State shall be hereafter subject to taxation by the laws of this State.

SEC. 10. That all railroads in this State, constructed, or that may

be hereafter constructed to intersect said Texas Pacific
315 railroad, shall have a right to connect with that line; that no discrimination in regard to charges for freight or passengers, or in any other manner, shall be made by said Texas Pacific Railroad Company against any of the said connecting roads; but that the charges per mile as to passengers and freight passing from the said Texas Pacific railroad over any of said connecting roads, or passing from any of said connecting roads over any part of said Texas Pacific railroad, shall be governed and controlled by the laws of this State, now or hereafter to be enacted; provided, that said connecting road or roads shall not discriminate in their charges for freight and passengers against said Texas and Pacific Railway Company, but shall carry the same at the same rates and charges as said railroad company or companies carry their own freight and passengers; and said railroad company shall not have the right or power to consolidate with, or sell, rent, or lease the same to any other railroad in this State, or to purchase or lease, nor enter into to any combination in the nature of a partnership with any railroad in this State running parallel with the said Texas and Pacific railroad, or in the same general direction, that would in any way or manner give said company the power or right to control the rates of freight and passage on said road so purchased; or leased; and should the provisions of this section be violated by said company, it shall work a forfeiture of the rights and privileges herein granted.

SEC. 11. That said Texas and Pacific Railway Company, by their board of directors, shall, within fifteen days from the date of approval of this act, signify to the governor, by telegraph or otherwise, the acceptance or rejection of the terms and conditions of this act; and within thirty days from the date of approval of this act, shall file a formal acceptance or rejection of the same with the secretary of state of the State of Texas.

SEC. 12. That all laws and parts of laws in conflict or inconsistent with the terms and provisions of this act be, and the same are hereby repealed.

SEC. 13. That this act take effect and be in force from and after its passage.

Passed May 2nd, 1873.

316 An act to encourage the speedy construction of a railway through the State of Texas to the Pacific ocean.

Whereas, the State of Texas has heretofore, at different periods, incorporated three different companies with power to construct a railway from the eastern boundary of the State to El Paso, on the Rio Grande, to wit: The Southern Pacific Railroad Company, the Memphis, El Paso and Pacific Railroad Company, and the Southern Transcontinental Railway Company; and

Whereas, the object of the State in these several acts of incorporation has ever been to secure the construction through the State of a railway connecting the railway system of the Atlantic States with the Pacific ocean; and

Whereas, there is a reason to believe that the said The Southern Transcontinental Railway Company will succeed by contract to the rights, franchises, and property of the said The Memphis, El Paso and Pacific Railroad Company; and that the time has come when, by concert of action between all of the said companies, and by the aid of the Government of the United States, the great object of a railway to the Pacific ocean through the State of Texas may be attained; and

Whereas, the speedy construction of said railway through the State of Texas would greatly enhance the value of the public lands, develop the mineral resources of the State, and give protection and security to the frontier by expelling therefrom the bands of hostile Indians by whom the western settlements are continually scourged; and

Whereas, these objects warrant and demand the most liberal legislation on the part of the State; therefore,

SECTION 1. Be it enacted by the legislature of the State of Texas, that in order to secure and promote the speedy construction of a railway through the State of Texas to the Pacific ocean, and thereby secure the incidental advantages of cheap transportation for immigrants to the western and unsettled portions of the State, facility of communication between the eastern and western boundaries, the settlement and enhancement in value of the now unoccupied public domain, and the development of the great mineral, agricultural, and stock-raising resources of the State, the State of Texas hereby consents, binds, and obligates itself to donate, and does hereby grant to the Southern Pacific Railroad Company and to the Southern Transcontinental Railway Company, heretofore chartered by the legislature of the State of Texas, the bonds of the State to the amount of six millions of dollars, in the manner and upon the terms and conditions following, to wit: To the Southern Pacific Railroad Company there are hereby granted the bonds of the State to the amount of three millions of dollars; and to the Southern Transcontinental Railway Company there are hereby granted the bonds of the State to the amount of three millions of dollars, upon the condition that the said companies, within six months after the passage of this act, will agree upon a point of junction of the two roads, which said point of junction shall be west of the longitude of the eastern boundary line of Shackelford county, and between the thirty-second and thirty-third parallel of north latitude, shall file such agreement, duly executed by the two companies in the form of an indenture between the two companies, in the office of the secretary of the State of Texas. The said The Southern Pacific Railroad Company shall build its road from the present western terminus thereof, at Longview, in Upshire county, by the most practicable route, to the city of Tyler, in Smith county, so that the said road shall pass within one-half mile of the court-house in said city; and from the said city of Tyler,
317 the said road shall be built westwardly, so as not to depart more than five miles from a due west course until it shall cross the Brazos river; and the said road shall be built from said Brazos river by the most practicable route to the point of junction.

And the said The *The* Southern Transcontinental Railway Company shall build its road from Jefferson to a point on the eastern boundary line of the State of Texas, bordering on the State of Arkansas, at or near Texarkana, and thence to the point of junction, continuing its line, as nearly as may be practicable, to the old survey of the Memphis, El Paso and Pacific Railroad Company. The said companies, within twelve months after the passage of this act, shall make a survey of the route of each of the said roads to the said point of junction, and shall file a map of the said routes in the general land office at Austin, and in the office of the secretary of state, and the distance between the principal points along said routes to the said point of junction shall be carefully noted on said map.

SEC. 2. The bonds in the foregoing section granted shall be of the denomination of one thousand dollars each, payable to the company which may be entitled, under the provisions of this act to receive them, or bearer, in thirty years from the date thereof, with interest at the rate of eight per cent. per annum, payable semi-annually, viz., on the first day of January and the first day of July of each year; said bonds to have coupons attached for each installment of interest to become due, which said coupons shall be made payable upon presentation at the city of New York, through such agent or agents of the State as the governor of the State may select and appoint to pay the same; the said bonds shall be signed by the governor and treasurer of the State of Texas, shall have the seal of the State affixed to them, and shall be countersigned and registered by the comptroller of public accounts.

SEC. 3. Unless and until adequate means shall be otherwise provided by law, for the payment of the current interest and two per centum as a sinking fund for the redemption of the principal of the bonds that may be issued under the provisions of this act, the comptroller of public accounts shall cause to be assessed a tax upon all taxable property, real and personal, in the State, and upon all occupations, proportioned to the taxes levied by general law on such property and occupations, sufficient annually to pay the accrued semi-annual interest on the bonds that may be issued under the provisions of this act, and two per centum as a sinking fund, which said sum shall be assessed and collected, and deposited in the treasury of the State, subject to the order of the governor, to meet the payment of the interest coupons and the principal of said bonds, as soon as and whenever the same shall become due; provided that no greater tax shall be assessed and collected by authority of this section, than may be needed from time to time to pay said interest and sinking fund; and provided further, that whenever adequate means shall be otherwise provided by law for the payment of the said interest and sinking fund, this section shall have no further force or effect, nor shall any tax whatever be assessed or collected by authority of this section, until the bonds granted by the first section shall have been issued in accordance with the provisions of the various sections of this act.

SEC. 4. None of the bonds heretofore provided for shall be issued or delivered to either of the said railroad companies until both of

the said roads shall be completed to the point of junction fixed in the first section of this act; and upon the completion of both of the said roads to the said point of junction, the whole amount
318 of the bonds hereinbefore granted shall be delivered to the said companies respectively, unless the legislature of the State shall have substituted for said bonds a grant of the public lands as hereinafter provided: Provided, that before issuing and delivering any of the said bonds to the said companies, or either of them, the governor of the State shall have such evidence as may be satisfactory to him, or such as may be prescribed by law, that both of the said roads have been completed to the said point of junction, and are then open to the use of the public.

SEC. 5. Whenever the legislature of the State shall have power, under the constitution of the State, to grant the public lands of the State in aid of internal improvements, it shall be competent for the legislature (if — shall think proper to do so) to substitute for the bonds hereinbefore granted a grant of the public lands to each of the said railroad companies to the amount of twenty-four sections to each of said companies for each mile of road built by the said companies respectively after the passage of this act to the said point of junction.

SEC. 6. If the legislature of the State shall not have substituted a grant of public lands for the said bonds, as is provided for in the foregoing section, before the said road shall be completed to the said point of junction, then the said bonds shall be issued and delivered to the said railroad companies, as is hereinbefore provided; but upon the fundamental condition, which shall be expressed in the face of said bonds, that the State of Texas shall at any time before the maturity of said bonds, and when the State shall have the power so to dispose of the public lands, have the right to redeem the said bonds by a grant of the public lands to the holder or holders of said bonds, at the rate of fourteen hundred and forty acres for each bond; and if the State shall at any time so redeem the said bonds, there shall be granted and issued to the holder of each bond, upon the surrender of the same to the State, three certificates for lands, two of which shall be for six hundred and forty acres each, and the other for one hundred and sixty acres; and the parties receiving the said certificates, in lieu of the bonds surrendered, shall have the right to locate the same upon any part of the then unappropriated public domain, free from all conditions whatsoever, except the payment of such office fees as may be prescribed by law for the issuance of certificates and patents in all other cases.

SEC. 7. If the legislature shall at any time make provisions for the redemption of the said bonds with lands, as is provided for in the next preceding section, the State shall give at least four months' notice to the holders of said bonds by advertisement published in at least one newspaper of general circulation in the city of New York, and at least two newspapers of general circulation published in the State of Texas, which said newspapers shall be selected by the governor of the State; which notice shall require the holders of said bonds to surrender the same at any time within two months

after the expiration of the four months' advertisement, to the treasurer of the State for a cancellation: Provided, that the treasurer of the State shall, in every case, receipt to the holder for the bonds so surrendered; and provided further, that bonds so surrendered shall be not cancelled until the land certificates in lieu of said lands shall be actually delivered to the interested party.

SEC. 8. The said railroad companies shall take no benefit whatever under the provisions of this act, but the same shall be null and void, unless the said railroads shall be completed to the said point of junction by the first day of January, A. D. 1874.

SEC. 9. Nothing in this act contained shall be construed to impair, diminish, or in any manner to affect injuriously any right enjoyed by either of the said railroad companies under existing laws.

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SEC. 10. Any provision of any former law inconsistent with the provisions and intent of this act shall be controlled by the provisions of this act.

SEC. 11. All the rights, benefits, and privileges granted and intended to be secured by this act to the Southern Pacific Railroad Company, and to the Southern Transcontinental Railway Company, shall pass to and invest in the Texas Pacific Railroad Company, a corporation created by and under the laws of the United States, by an act of Congress, approved March 3rd, A. D. one thousand eight hundred and seventy-one, whenever the said Southern Pacific Railroad Company and the said Southern Transcontinental Railway Company shall have been consolidated with the said Texas Pacific Railroad Company; and authority is hereby given to the Southern Pacific Railroad Company, the said Southern Transcontinental Railway Company, and the said Texas Pacific Railroad Company, to consolidate on such lawful terms and conditions as may be agreed upon between the said companies, and be ratified by a majority of the stockholders of each of the corporations so consolidated; provided, however, that the said Texas Pacific Railroad Company shall take no benefit whatever, under or by virtue of this act, until the said company shall have fully performed all the conditions imposed by this act upon the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company.

SEC. 12. This act shall take effect and be in force from and after its passage.

Passed May 24th, 1871.

320

An act amendatory of and supplementary to an act entitled "An act to encourage the speedy construction of a railway through the State of Texas to the Pacific ocean; passed on the twenty-fourth day of May, 1871."

SECTION 1. Be it enacted by the legislature of the State of Texas, That section one of the above-entitled act shall be so amended as to read as follows:

SEC. 1. Be it enacted by the legislature of the State of Texas, That in order to secure and promote the speedy construction of a railway

through the State of Texas to the Pacific ocean, and thereby secure the incidental advantages of cheap transportation for emigrants to the western and unsettled portion of the State, facilities of communication between the eastern and western boundaries, the settlement and enhancement in value of the now unoccupied public domain, and the development of the great mineral, agricultural, and stock-raising resources of the State, the State of Texas hereby consents, binds, and obligates herself to donate, and does hereby grant to the Southern Pacific Railroad Company, and to the Southern Transcontinental Railway Company, heretofore chartered by the legislature of the State of Texas, the bonds of the State of Texas to the amount of six millions of dollars, in the manner and upon the terms and conditions following, to wit: To the Southern Pacific Railroad Company there are hereby granted the bonds of the State to the amount of three millions of dollars, and to the Southern Transcontinental Railway Company there are hereby granted the bonds of the State to the amount of three millions of dollars, upon the conditions that the said companies shall before the first day of June, A. D. 1872, agree upon a point of junction of the two roads, which said point of junction shall be within three miles of the junction of the West fork and Clear fork of the Trinity river, and on the south side of said rivers, and shall file such agreement, duly executed by the two companies, in the form of an indenture between the two companies, in the office of the secretary of state of the State of Texas. The said Southern Pacific Railroad Company shall build its road from the present western terminus thereof at Longview, in Upshur county, by such route as the said company may deem the most practicable, crossing the Central railroad within one mile of Browder's spring, to the said point of junction; and the said Southern Transcontinental Railway Company shall build its road from Jefferson to a point on the eastern boundary of the State of Texas, bordering on the State of Arkansas, at or near Texarkana, and thence through the town of Clarksville in Red River county, and through the city of Paris, in Lamar county, to the point of junction, confining its line as near as may be practicable, to the old survey of the Memphis, El Paso and Pacific Railroad Company; and for the purpose of more certainly and conveniently transporting the material necessary to the construction of said road as above defined, the said Southern Transcontinental Railway Company shall have the right to construct a railway from the town of Marshall, in Harrison county, to Jefferson, which shall be a part of the railway of the said company; provided that the said company shall not be entitled to apply any part of the subsidy herein granted to the said road from Marshall to Jefferson. The said companies, by the first of September, 1872, shall make a survey of the route of each of the said roads to the said point of junction, and shall file a map of said route in the general land office at Austin, and in the office of
321 the secretary of state, and the distances between the principal points along said routes to the said point of junction shall be carefully noted on said maps.

SEC. 2. That section four of said act be so amended as to read as

follows; the bonds hereinbefore provided shall be issued and delivered to the said railroad companies, or either of them, which may be entitled to receive the same, in the following manner, to wit:

When either of said companies shall complete, equip, and put in running order twenty-five consecutive miles of said line of road, and the chief engineer of said company shall certify the same to the governor of the State, under oath, it shall be the duty of the governor to detail such officers as may be prescribed by law, or appointed by the governor for that purpose, to examine the same, and upon the written report of such officer that the said twenty-five miles of such railroad have been completed in a thorough and substantial manner, *and* it shall then be the duty of the governor to issue and deliver to the said company the bonds herein provided for to the amount of ten thousand dollars per mile for each and every mile of said twenty-five miles of said road. Then and thereafter, so soon and so often as said companies or either of them shall complete ten miles of their road, and equip and put the same in running order, it shall be the duty of the governor to deliver to said companies, respectively, the bonds hereinbefore provided, at the rate of ten thousand dollars per mile for each and every mile of the said roads, in a like manner and under the same restrictions as hereinbefore provided, until the said roads shall be completed to the said point of junction.

SEC. 3. That section five of said act be so amended as to read as follows: That the legislature of the State of Texas, if vested with the constitutional power to do so, may at any time before the first day of January, A. D. 1874, substitute for the bonds hereinbefore donated a grant of the public lands of the State to the amount of twenty-four sections to the miles, to each of said companies respectively, for each and every mile of road built by said companies respectively, after the passage of this act, in lieu of said bonds, and in like manner under the same restrictions as provided in this act; provided that if any of the bonds herein provided shall be issued before the legislature shall make substitution, then said bonds shall be redeemed and cancelled, as provided in sections six and seven of this act; and provided further, that if the legislature shall not have made such substitution of lands for the said bonds by the first day of January, 1874, then the said company shall have the right, at any time thereafter, when the legislature shall have power to grant the public lands in aid of internal improvements, to deliver to the governor of the State any bonds which may have been delivered to them under the provisions of this act, and shall receive therefor a grant of the public lands to the amount and in the manner provided in section six of this act.

SEC. 4. That section eight of said act shall be so amended as to read as follows: That should either of said companies fail to complete its road to the said point of junction by the first day of January, 1874, then said companies shall thereafter take no further benefit under the provisions of this act.

SEC. 5. That the said Southern Pacific Railroad Company and the Southern Transcontinental Railway Company are hereby empow-

ered to conform the gauge of their several roads to such gauge as may be adopted by the Texas Pacific Railroad Company, chartered under act of Congress of the United States March 3rd, eighteen hundred and seventy-one.

322 SEC. 6. That it is the intent and purpose of this act, and of the act to which this act is amendatory, that each of the said railroad companies shall be entitled to three millions of dollars of said bonds, and that neither of said companies shall receive more than ten thousand dollars per mile for the construction of their roads to the said point of junction, and the said companies shall be entitled to receive ten thousand dollars per mile for a single-track railroad westward from the point of junction towards El Paso, until the whole amount of bonds granted shall be consumed, but in no event shall the amount of bonds — be issued under the provisions of the act, of which this act is amendatory, exceed six millions of dollars; provided that the said companies, after reaching the said point of junction shall construct the single track westward towards El Paso at the rate of one hundred miles per annum, until the whole amount of the subsidy shall be exhausted; failing to do which, the said companies shall forfeit all right to any subsidy beyond the said point of junction.

SEC. 7. The said railroad companies shall be subject to no limitation of time in the construction of their roads other than is provided in this act, and the act of which this act is amendatory.

SEC. 8. Anything contained in the act of which this is amendatory, and the other laws or parts of laws, contrary to or inconsistent with the provisions of this act, is hereby repealed, and this act shall take effect from and after its passage.

Passed Nov. 21, 1871.

322½ [Endorsed:] No. 186. U. S. circuit court, western district of Texas, at Austin. The Mercantile Trust Company, trustee, complainant, *vs.* The Texas and Pacific Railway Company, John H. Reagan, & *als.* The Texas and Pacific Railway Company of Texas, cross-complainant, *vs.* The Mercantile Trust Company, John H. Reagan, & *als.* Amendment to bill of complaint. Filed Mar. 23, 1893. B. G. Duval, clerk, by D. H. Hart, d'y.

323 In the Circuit Court of the United States, Western District of Texas, in the 5th Circuit. In Equity.

THE MERCANTILE TRUST CO., Trustee, Complainants,
vs.
THE TEXAS & PACIFIC RAILWAY CO. and JOHN H. REAGAN *et al.*, Defendants.
No. —. Original Bill.

THE TEXAS & PACIFIC RAILWAY COMPANY, Complainants,
vs.
THE MERCANTILE TRUST CO., Trustee, and JOHN H. REAGAN *et al.*, Defendants.
Cross-bill.

To the honorable judges of said court:

The Texas and Pacific Railway Company, cross-complainant in the above-entitled cause, now amends its cross-bill herein filed as follows, to wit:

First. By adding at the end of paragraph third the following words, viz:

"That there has been necessarily expended in cash in the construction and equipment of the lines of railway aforesaid, owned and operated by your orator, more than $50,000.00 per mile of such road, and that the same could not be reconstructed and replaced for less than $30,000.00 per mile.

"That the lines of railway of your orator have at all times been operated as economically as possible, and that its operating expenses have at all times been as reasonable and low in amount as they could be made by economical and judicious management, and that it has not been possible for your orator to operate said road for less than it has been operated; that for the year ending June 30th, 1891, there were employed by your orator 41 general officers, who received during said year an average daily compensation of $7.02. Exclusive of its general officers, its employees received during said year an average daily compensation of $2.09, and for the
324 year ending June 30th, 1892, it had 42 general officers, who during said year received an average daily compensation of $7.05, and all its employees, excluding general officers, received during said year an average daily compensation of $2.12; that at all times your orator has secured the services of its officers and employees as cheaply as practicable and has employed no more than necessary, and that the above were fair and reasonable rates of pay; that at all times your orator has secured all supplies, material, and property of whatever character used in the operation of the road at the cheapest market price and at as low rates as the same could be secured, and has secured and used no more than was actually necessary in the operation of the road; that your orator files & here refers to exhibits marked respectively Exhibits "H" & "I" to compl'ts' bill, copies of its sworn reports made by its officers to the railroad commission of Texas for the years ending respectively June 30th, 1891 and 1892, on the forms prescribed by said commission

which show its operating expenses in detail, each and every item of which was as reasonable in amount and as low as practicable. Your orator alleges that the loss in revenue sustained by it by the observance and application of the first 10 tariffs established by the commission, being commodity tariffs 1 to 10, inclusive, as set forth in Exhibit "C" to complainants' bill, which is referred to & made a part of this cross-bill, from the respective dates upon which each of said tariffs took effect until the 31st day of July, 1892, amounted to $252,102.72; that this does not include loss in revenue to said railroad company arising from reduction in rates affected by the commission tariffs subsequent in number and date to commodity tariff No. 10, set forth in Exhibit "C;" that all of said tariffs, if in force, would cause an annual loss of $400,000.00; that the tariffs established by the said railroad commission effected average reductions in the rates theretofore charged by your orator substantially as follows:

325	On wheat, average reduction	13	per cent.
	Other grain	12.88	per cent.
	Flour, meal, hominy, and grits	23	per cent.
	Salt (car-loads)	12.50	per cent.
	Hay	5	per cent.
	Lumber, etc.	15	per cent.
	Cotton seed	25	per cent.
	Cotton-seed oil reduced, but effect nominal.		
	Cotton-seed hulls reduced, but effect nominal.		
	Cotton-seed meal and cake reduced, but effect nominal.		
	Cotton	15	per cent.

11.

	Flour, L. C. L., local	26	per cent.
	Grain, L. C. L., local	20	per cent.
	Salt, L. C. L., local	55	per cent.
	Flour, L. C. L., through	45	per cent.
	Grain, L. C. L., through	49	per cent.
	Salt, L. C. L., through	50	per cent.
	Wood	38	per cent.
	Coal, reduction, but effect nominal.		
	Stone and sand	7	per cent.
	Common brick	33	per cent.
	Fire-brick	80	per cent.
	Cement and plaster, reduction.		
	Lime, C. L.	18	per cent.
	Wool	5.50	per cent.
	Pig-iron, reduction, but nominal.		
	Scrap iron	18	per cent.
	Junk	37	per cent.
	Iron fencing, C. L.	41.21	per cent.
	Iron fencing, L. C. L.	51	per cent.
	Iron roofing (car-loads)	46.21	per cent.

Iron roofing, L. C. L.	48.43	per cent.
Iron fencing; not otherwise specified, C. L.	60.95	per cent.
Iron fencing, not otherwise specified, L. C. L.	62.23	per cent.
Iron roofing and fencing in bundles, C. L.	60.95	per cent.
Iron roofing and fencing in bundles, L. C. L.	57.70	per cent.
Stock cattle	38.54	per cent.
Beef cattle, west of Fort Worth	30	per cent.
Beef cattle, east of Fort Worth	16	per cent.
Calves, goats, sheep, hogs, L. C. L., single deck, west of Fort Worth	47.43	per cent.
Calves, goats, sheep, hogs, L. C. L., single deck, east of Fort Worth	37.97	per cent.
Calves, goats, sheep, hogs, L. C. L., double deck, west of Fort Worth	30	per cent.
Calves, goats, sheep, hogs, L. C. L., double deck, east of Fort Worth	16	per cent.
Horses and mules west of Fort Worth	34	per cent.
Horses and mules east of Fort Worth	37.87	per cent.

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Average entire line, stock cattle	35	per cent.
Average entire line, beef cattle	35	per cent.
Average entire line, calves, goats, sheep, etc., single deck	30	per cent.
Average entire line, calves, goats, sheep, etc., double-deck cars	35	per cent.
Average reduction entire line, horses and mules	35	per cent.
Straw wrapping paper	21.78	per cent.
Manilla wrapping paper	41.81	per cent.
326 Straw	22.25	per cent.
Fire-brick, etc., by tariff No. 22	40	per cent.
Fruits, vegetables, etc., C. L.	48	per cent.
Fruits, vegetables, etc., L. C. L.	39	per cent.
Commodity tariff No. 24, cancelling No. 1, on flour, grain, meal, etc., further reduced the rates on these commodities beyond what is above shown, about	17	per cent.
Beer and ice, about	21	per cent.

These figures give the general result of the commission tariffs on the commodities named, after taking into account the increase, if any, to certain points. (See testimony of E. H. Hinton, G. F. A.)

That the decrease in your orator's rates and revenues made by said commission have not and will not cause any such increase in the tonnage or business of your orator's road as will in any degree whatever make up or compensate for the loss in revenue caused by the reduction in said rates; that your orator before and during the period when said commission tariffs were in effect and now charges as high passenger rates as are allowed by the laws of the State of Texas, and derived and derives all the revenue possible from any and all other sources, including interstate and foreign traffic; that

the divisions of through rates now and at all times heretofore enjoyed by your orator on interstate and foreign commerce moving over two or more lines has exceeded and does greatly exceed the divisions of through rates on shipments moving between points within the State of Texas which your orator did or could derive under the rates fixed by said commission—that is to say, for hauling the freight the same distance or performing the same service your orator received largely more revenue on business interchanged with interstate roads or on foreign or interstate business than it did or could receive on business interchanged under the rates of said commission with roads within the State and subject to the rates of the said commission, and that your orator's interstate rates, as well as the interstate and foreign rates of all other lines doing an interstate and foreign business to and from Texas, now and at all
327 times have been higher than the rates fixed for the same or corresponding distance by the said commission; that each and all of the tariffs issued by your orator putting into effect the rates of said commission were issued under protest, and there was printed thereon by your orator the words following, viz: "This tariff is issued by order of the railroad commission of Texas under protest, and the right to contest the same in the courts is reserved".

Second. By adding at the end of paragraph 13 the following, viz:

"Your orator represents that the said defendants, Reagan, McLean, Foster, and Culberson, are contending that your orator is bound by the act of April 3rd, 1891, and all other general laws of the State of Texas in reference to railroads constructed in said State, by virtue of an act passed by the legislature of the State of Texas May 2nd, 1873, which subsequently became a law within the time prescribed by the constitution, entitled 'An act to define and adjust the rights of the Texas & Pacific Railway Company within the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific ocean,' by which said act the State of Texas, among other things, agreed to grant and donate to your orator company twenty sections of land of 640 acres each for every mile of its road completed in good substantial running order in the manner and upon the terms and to the points in said act provided, a copy of which said act is made a part of complainants' bill, marked 'Exhibit D,' and is here referred to for the full understanding of its terms, and for that purpose only; and in consideration of said grant and donation it was provided in said act, among other things, that 'the said Texas & Pacific Railway Company shall be subject to such general laws as may be enacted by the legislature applicable to other railroads constructed within this State,' and by section 11 of which said act of May
328 2nd, 1873, it was provided 'that said Texas & Pacific Railway Company, by their board of directors, shall within fifteen days from the date of the approval of this act signify to the governor by telegraph or otherwise an acceptance or rejection of the terms of this act, and within thirty days from the date of the approval of this act shall file a formal acceptance or rejection of the same with the secretary of state of the State of Texas;' that

said defendants contend that your orator is so bound by said acts, because within the time prescribed by said act the board of directors of said company signified to the governor, in the manner therein prescribed, an acceptance of the terms and conditions of said act, and within the time therein prescribed filed with the secretary of state of the State of Texas a formal acceptance of the terms and conditions of said act; but your orator avers that such claim or contention on the part of the said defendants is untrue and not well founded for these reasons: That the charter of your orator, the Texas & Pacific Railway Company (act of Congress approved March 3rd, 1871), provided, among other things, as follows: "Sec. 4. That said Texas & Pacific Railroad Co., shall have power and lawful authority to purchase the stock, land, land grants, franchises and appurtenances of, and consolidate on such terms as may be agreed upon between the parties, with any railroad company or companies heretofore chartered by congressional, State or territorial authority on the rate prescribed in the first section of this act, but no such consolidation shall be with any competing through lines of railroads to the Pacific ocean;" and section 6 of said act provided "that the rights, lands, land grants, franchises and appurtenances and property of every description belonging to each of the consolidated or purchased railroad company or companies, as herein provided, shall vest in and become absolutely the property of the Texas & Pacific Railroad Co.;" that the Southern Pacific
329 Railroad Company was incorporated by act of the Texas legislature approved February 16th, 1852, and the Southern Transcontinental Railway Company was incorporated by an act of the Texas legislature approved July 27th, 1870. By an act of the Texas legislature approved May 24th, 1871, the Southern Pacific Railroad Company and the Southern Transcontinental Railway Co. were authorized to consolidate with your orator, The Texas Pacific Railroad Co., the provisions of this in this respect being as follows: "Sec. 11. All the rights, benefits, and privileges granted and intended to be secured by this act to the Southern Pacific Railroad Co. and to the Southern Transcontinental Railway Company shall pass to and vest in the Texas Pacific Railroad Co., a corporation created by and under the laws of the United States by an act of Congress approved March 3rd, A. D. 1871, whenever the said Southern Pacific Railroad Co. and the said Southern Transcontinental Railway Co. shall have been consolidated with the said Texas Pacific Railroad Co., and authority is hereby given the said Southern Pacific Railroad Co. and said Southern Transcontinental Railway Co. and the said Texas Pacific Railroad Co. to consolidate on such lawful terms and conditions as may be agreed upon between the said companies and be ratified by a majority of the stockholders of each of the corporations so consolidating: Provided, that the Texas Pacific Railroad Co. shall take no benefits whatever under or by virtue of this act until the said company shall have fully performed all the conditions imposed by this act upon the Southern Pacific Railroad Co. and the Southern Transcontinental Railway Co." A copy of said act and act amendatory

thereof is attached, marked Exhibits "E" & "F" to complainants' amended bill, is here referred to and prayed to be made a part of this amended cross-bill. That in pursuance of the powers thus expressed, and of that power alone in so far as the State of Texas was concerned, the consolidation was effected.

330 That at the time of the passage of the act of May 2nd, 1873, hereinbefore referred to as Exhibit "D" to complainants' bill, the consolidation had been actually effected, and nothing remained to be done; that said consolidation had been effected by merger of the Southern Pacific Railroad Co. and the Southern Transcontinental Railway Co. into the Texas & Pacific Railroad Co. through delivery of deeds, whereby the said former companies sold and assigned unto your orator, The Texas & Pacific Railway Co., all of their property, franchises, contracts, rights, privileges, etc., said deeds of consolidation and merger each containing this provision: "The object and purpose of this indenture being to consolidate the said corporations into one by the sale of the Southern Pacific Railroad Co. (in the one case, and the Southern Transcontinental in the other) and all its property, rights, and franchises into the said Texas Pacific Railroad Company, so that the two corporations thus consolidated in accordance with the laws under which they were created may become one by merging the said Southern Pacific Railroad Company (or the Southern Transcontinental) into the said Texas Pacific Railroad Company;" that all of the considerations upon which the consolidation was effected under the laws of Congress and of the State of Texas were fixed and established by the said act of the legislature of the State of Texas of May 24th, 1871, and by said deeds of merger, and that neither the act of the legislature of the State of Texas approved February 16th, 1852, incorporating the Southern Pacific Railroad Company, nor the act of said legislature approved July 27th, 1870, incorporating the Southern Transcontinental Railway Company, nor the act of said legislature approved May 24th, 1871, authorizing the consolidation and merger of said companies with and into the Texas Pacific Railroad Company, hereinbefore referred to, imposed any such restrictions and limitations requiring the Texas & Pacific Railroad Company to subject itself to the laws of the State of Texas

331 and relinquish its Federal franchises and obligations, as was sought to be imposed upon it by the aforesaid act of the legislature of the State of Texas approved May 2nd, 1873, as hereinbefore referred to as Exhibit "D" to compl'ts' bill; that the power to consolidate, both under Federal and State legislation, had been exercised and exhausted when the act of May 2nd, 1873, was adopted, and said consolidation, as above set forth, had been fully effected and completed; that the act of May 2nd, 1873, not only recited the consolidation, but recognized it as an accomplished fact and dealt with the rights of the Texas & Pacific Railroad Co. only as the assignee of the donations of the State to the two Texas companies which had been merged into it. Said act recites the power of the Texas companies to consolidate with your orator, Texas & Pacific Railway Company, describing the latter as a corporation created by an act of

the Congress of the United States, and further recites: "Whereas it appears from documentary evidence on file in the office of the secretary of state of the State of Texas that such consolidation has been effected, and as a difference of opinion may arise as to the construction of the acts of the legislature, hereinbefore referred to, in regard to the amount of lands to which said Texas & Pacific Railway Company may be entitled under the said acts of incorporation and other laws of this State; and whereas it is desirable that there should be a complete and final adjustment of the rights of said Texas & Pacific Railroad Company as the assignee and successor of the said Southern Pacific Railroad Company and the said Southern Transcontinental Railway Company under the laws of this State, and a definite understanding as to the obligations of the State, and to the further end that said company be encouraged to a speedy construction of said railway, etc.;" thus in express terms fully recognizing and ratifying said consolidation; that by the aforesaid acts creating and incorporating the Southern
332 Pacific Railroad Company and the Southern Transcontinental Railway Company, and by an act entitled "An act to encourage a speedy construction of a railway through the State of Texas to the Pacific ocean," passed May 24th, 1871, and by an act amendatory thereof, passed November 21st, 1871, the State of Texas granted to and conferred upon said companies and your orator, The Texas and Pacific Railway Company, for the consideration and inducement in said act specified, the bonds of the State of Texas of the denomination of $1,000.00 each, payable to said companies or bearer in 30 years from the date thereof, with interest at the rate of 8 % per annum, payable semi-annually, to the amount of $6,000,000.00 in all, with the right reserved to the State of Texas to substitute for said bonds a grant of the public lands to said company to the amount of 24 sections of land of 640 acres each for each mile of road built by your orator, all the rights and benefits granted by the State of Texas by virtue of these acts had become vested in your orator, and all conditions and requirements thereof had been complied with by your orator before the passage of May 2nd, 1873, hereinbefore referred to as Exhibit "D" to complainant's bill, and by said act of May 2nd, 1873, your orator not only acquired no additional benefits or donations, but the donations, the title to which had actually vested in it under *in it under* the previous consolidation, were cut down and limited by eliminating the grant of bonds and reducing by 4 sections the alternative or substituted grant of lands; that at the date of the passage of said act of May 2nd, 1873, your orator, The Texas and Pacific Railway Company, did not receive nor has it at any time since received the money or the lands in lieu of the money promised by the State of Texas, except twenty sections of land of 640 acres each for 402 miles of road constructed, completed, and equipped by it, according to the terms of said act, and although your orator has since the passage of said
333 act of May 2nd, 1873, constructed, completed, and fully equipped, in accordance with the requirements and terms of said act, more than 550 miles of its railway, in addition to the 402

miles before mentioned, yet your orator has not received the twenty sections of land, of 640 acres each, for every mile of road so constructed and completed, and the State of Texas has undertaken to repeal all laws under and by virtue of which said lands could be acquired, including the said act of May 2nd, 1873, and has by general laws withdrawn all its lands from location or appropriation by your orator out of which said donation or grant could have been satisfied, which general laws are here referred to; that the said act of May 2nd, 1873, had no part whatever in fixing the terms of the consolidation and merger of said Texas corporations with and into your orator, The Texas & Pacific Railway Company, and that said act has never received the sanction of Congress, either express or implied; that by an act approved June 22nd, 1874, amending and supplementing the acts theretofore passed, creating your orator, The Texas & Pacific Railway Company, by the consolidation of the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company with and merger into the Texas & Pacific Railway Company, as accomplished under the aforesaid act of the State of Texas of May 24th, 1871, the Congress of the United States expressly recognized and limited such consolidation by the following provision in said act: "And such mortgages for the division east of Fort Worth shall embrace the roads and property of the Southern Pacific Railroad Company and of the Southern Transcontinental Railway Company, heretofore merged in and consolidated with said Texas & Pacific Railway Company under the authority and requirements of the laws of the State of Texas; and each road so merged as aforesaid shall for that and all other purposes be deemed and taken to be a part of said Texas & Pacific railway and shall hereafter be subject
334 to all the provisions and limitations of the act of Congress incorporating said company and *the* all the supplements thereto." Thus, by the terms of said act, Congress reserved and retained unto itself and excluded on the part of the State all the rights and powers established by the provisions and limitations of the act of Congress incorporating said company and the supplements thereto; that Congress has never in any manner sanctioned or consented to the subjection of your orator company to the general laws or to any other laws of the State of Texas; but has, as aforesaid, distinctly enacted to the contrary; that if said act of 1873 or any other legislation of the State of Texas can be construed as a contract by said company to substitute the sovereignty of the State for that of the United States over said company the same is in such event *ultra vires*, contrary to the public policy of the United States, null and void, and said nullity for the reasons aforesaid is hereby specially pleaded and urged.

Second. By adding at the end of paragraph 13 the following words, viz:

"13*b*. That on or about the 7th day of February, 1854, the legislature of the State of Texas passed an act which was duly approved by the governor, which, among other things, provided: 'Sec. 1. Be it enacted, etc., that all railroad companies which have been hereto-

fore incorporated, or which shall hereafter be incorporated or relieved from the performance of any act required of them, or which shall accept of any donation or loan from this State, or which shall accept of the subscription of any county of this State, shall have all the powers and privileges and be subject to all the duties, liabilities, and provisions contained in this act.

SEC. 15. It shall be lawful for the legislature at any time to prescribe the rates to be charged for the transportation of persons and property upon any such road should they be deemed too
335 high, and may exercise the same power every ten years; provided that no reductions shall be made unless the net profits of the company for the previous 10 years, the expenditures of the company being *bona fide* and not with a view to defeat the operation of this section, shall amount to a sum equal to 12 per centum per annum upon its capital stock, and then so as to not reduce the future probable profits below the said per centum."

That, as aforesaid, your orator was incorporated and all of its railway, except about 500 miles lying west of Fort Worth, was constructed while said act was in effect, the same not having been repealed until the year 1879, when it was omitted by the commissioners when they compiled the revised civil statutes of the State of Texas; that the said act was never expressly repealed by the legislature of the State of Texas, and if ever repealed it was only repealed by implication by the adoption by the legislature of the statutes as revised by the said commissioners.

Third. Cross-complainant reiterates each and every allegation in its cross-bill of complaint and prays the court to allow this amendment to be filed; and your orator prays, as on its original bill prayed, for all other and further orders and equitable relief in the premises.

R. S. LOVETT,
T. J. FREEMAN,
Solicitors for Cross-complainant.

W. W. HOWE,
WINSLOW S. PIERCE,
Of Counsel for Cross-complainant.

335½ [Endorsed:] No. 186. Mercantile Trust Co. *vs.* Texas & Pacific R'w'y Co. Texas & Pacific R. Co. *vs.* John H. Reagan *et als.* Amendment to cross-bill of the Texas & Pacific R'w'y Co. Filed Mar 23, 1893. B. G. Duval, clerk, by D. H. Hart, d'y.

336 In the United States Circuit Court for the Western District of Texas, at Austin.

THE MERCANTILE TRUST COMPANY, Trustee, Complainant,
v.
THE TEXAS AND PACIFIC RAILWAY COMPANY, JOHN H. REAGAN, *et al.*, Defendants. } No. 186.

The defendants, John A. Reagan, W. P. McLean, L. L. Foster and C. A. Culberson, respectfully ask leave of the court to withdraw their answers heretofore filed by them in this cause to the original

bill filed by complainant and the cross-bill filed by the defendant railway company, and permit them to file a demurrer to said original complaint and cross-bill, so that same may be considered as if no answer had been filed to said original and cross-action, and that the demurrer was filed on the rule day, to which the subpœnas were returnable.

The purpose of this motion is to raise in a simple and direct manner the questions of law involved in this cause, and it has no other object in view. No delay will be occasioned thereby and no injury to complainant or cross-complainant, inasmuch as the defendants offer to proceed immediately with the consideration of the demurrer, and if the same be overruled, leave will not be asked to file answers to said original and cross-actions, but judgment may be rendered upon said demurrer, and failure of defendants to answer the bill and cross-bill, from which judgment defendants will appeal.

C. A. CULBERSON,
H. C. COKE,
W. S. SIMKINS,
Solicitors for Defendants.

(Endorsed:) No. 186. The Mercantile Trust Company, trustee, complainant, *v.* The Texas and Pacific Railway Company, John H. Reagan, *et al.*, defendants. Motion to withdraw answer and file a demurrer. Filed March 20, 1893. B. G. Duval, clerk; by D. H. Hart, deputy.

337 AUSTIN, TEXAS, *March* 23, 1893.

United States Circuit Court, Western District of Texas, at Austin.
In Equity.

MERCANTILE TRUST COMPANY, Trustee, *vs.* THE TYLER SOUTHEASTERN RAILWAY COMPANY *et als.*	189. Original Bill.
THE TYLER SOUTHEASTERN RAILWAY COMPANY *vs.* THE MERCANTILE TRUST COMPANY, JOHN H. REAGAN, *et als.*	Cross-bill.
THE MERCANTILE TRUST COMPANY, Trustee, *vs.* THE ST. LOUIS SOUTHWESTERN R'Y CO. OF TEXAS *et als.*	188. Original Bill.
THE ST. LOUIS SOUTHWESTERN R'Y CO. OF TEXAS *vs.* THE MERCANTILE TRUST COMPANY, JOHN H. REAGAN, *et als.*	Cross-bill.

THE MERCANTILE TRUST COMPANY, Trustee, *vs.* THE TEXAS & PACIFIC RAILWAY CO., JOHN H. REAGAN, *et als.*	186.	Original Bill.
337½ THE TEXAS & PACIFIC RAILWAY CO. *vs.* THE MERCANTILE TRUST CO., JOHN H. REAGAN, *et als.*		Cross-bill.
THE FARMERS' LOAN & TRUST CO., Trustee, *vs.* THE GULF, COLORADO & SANTA FÉ R'Y CO. *et als.*	190.	Original Bill.
THE GULF, COLORADO & SANTA FÉ R'Y CO. *vs.* THE FARMERS' LOAN & TRUST CO., JOHN H. REAGAN, *et als.*		Cross-bill.
THE FARMERS' LOAN & TRUST CO., Trustee, *vs.* THE INTERNATIONAL & GREAT NORTHERN RAILROAD CO. *et als.*	187.	Original Bill.
THE INTERNATIONAL & GREAT NORTHERN RAILROAD CO. *vs.* THE FARMERS' LOAN & TRUST CO., JOHN H. REAGAN, *et als.*		Cross-bill.

These causes came on this day to be heard on the motions of defendants John H. Reagan, L. L. Foster, William P. McLean, and Charles A. Culberson, for leave to withdraw their answers to the bills of complaint and cross-bills in the above-entitled causes, and for leave to file demurrers to said bills and cross-bills. Whereupon and on consideration whereof complainants and cross-complainants consenting to the granting of said leave, subject to terms as
338 hereinafter set forth, and said defendants not objecting to said terms—

It is ordered, adjudged, and decreed that said defendants be, and they are hereby, allowed to withdraw their said answers to said bills and cross-bills in said causes and to file demurrers thereto upon the terms and conditions following, viz:

(1.) That said defendants do pay all costs of taking testimony and depositions in said causes, against them to be taxed, and it is hereby ordered that execution do issue therefor.

(2.) That said complainants and cross-complainants be, and they are hereby, allowed to amend their respective bills and cross-bills before said demurrers be filed and in such manner as they may be advised.

March 23, 1893.

A. P. McCORMICK,
Circuit Judge.

By consent of all parties in the above causes it is hereby ordered that the exhibits marked "H" and "I" to the original bills and cross-bills shall be made a part of the records in these causes, the originals, without copying the same, to accompany the records as a part of the same to the Supreme Court of the United States.

March 23, 1893.

A. P. McCORMICK,
Circuit Judge.

338½ [Endorsed:] Copy of order granting leave to withdraw answers and file demurrers.

339 MERCANTILE TRUST COMPANY
vs.
T. AND P. R'Y CO., JNO. H. REAGAN, *et als.* } No. 186.

Now comes complainant and sets down the above cause for hearing on bill and answer as to the defendant The Texas & Pacific Railway Company.

March 23, 1893.

Attest:

B. G. DUVAL, *Clerk.*
By D. H. HART, *Deputy.*

[Endorsed:] Rule setting down cause on bill and answer.

340 In the United States Circuit Court for the Western District of Texas, at Austin. In Equity.

THE MERCANTILE TRUST COMPANY, Trustee, Complainant,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY, JOHN H. REAGAN, *et al.*, Defendants.

The demurrer of John H. Reagan, W. P. McLean, L. L. Foster, and C. A. Culberson to complainant's bill as amended.

These defendants, by way of protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, demur to the bill of complaint and for causes of demurrer show:

That said complainant hath not in and by said bill made or stated such a cause of action as doth or ought to entitle it to any such relief as is thereby sought and prayed for against these defendants. Wherefore, these defendants pray judgment of this honorable court whether they shall be compelled to further answer and pray to be dismissed with their costs.

And for specific causes of demurrer to the sufficiency of the various allegations of the said bill, defendants say:

(1.) That it does not appear from the allegations of said bill that the complainants have any interest in the subject-matter of the com-

plaint and in equity cannot demand the relief sought in the
341 prayer of said bill. Because the injury complained of is too remote, and the bill shows no legal damage to complainant, because the relief asked by complainant in effect deprives the railway company of the management of its own affairs and substitutes the judgment of the court for that of the directory of the railway company.

(2.) Because it appeareth from the face of said bill that complainant has a plain and adequate remedy at law.

(3.) Because it appeareth from the face of the bill of complaint that the suit is against the State of Texas and consequently obnoxious to the 11th amendment of the Constitution of the United States.

(4.) Because it appeareth from the face of the bill of complaint that complainant seeks to enjoin the judgment of a special tribunal of the State of Texas, said tribunal having jurisdiction under the constitution and laws of Texas to try and determine the special matters sought to be enjoined, and from which judgment a plain and adequate remedy by appeal had been granted to all parties interested by the laws of Texas.

(5.) Because it appears from the bill that complainant seeks to stay judicial proceedings when necessary to be brought under the laws and in the name of the State of Texas in the courts of Texas.

(6.) Because it appears upon the face of said bill that the complainant seeks to enjoin the attorney general of the State of Texas from bringing any action or enforcing penalties against the defendant railroad company, provided by law to enforce obedience upon the part of the defendant company to the laws of the State of Texas.

(7.) Because it appears from the face of the bill that section 5, of act of the State of Texas, known as the railroad commission act and set forth in the bill, of which complainant complains as unconstitutional because depriving them of due process of law, is not obnoxious as alleged to the fourteenth amendment to the Constitution of the United States, but that the said section taken in connection with other sections of the said railroad commission act is a valid provision and constitutional.

(8.) Because it appears from the face of the bill that section 5 of the railroad commission act, if obnoxious to the Constitution of the United States, does not affect the law as a whole and said commission law is valid and constitutional though section 5 be
342 & 343 declared unconstitutional and void, and the relief prayed for by complainant to enjoin the railroad commission of the State of Texas from ever hereafter making any rates or issuing or delivering any further tariffs, orders or circulars or the relief sought by complainant's bill enjoining all persons hereafter from by claiming any right under said law, cannot in equity be granted this court.

(9.) Because it appears that the commission law, as set forth in complainant's bill and upon the invalidity of which the whole of the relief asked by complainant is based, is a valid and constitu-

tional law and the court has no jurisdiction in this case because the law being constitutional, no Federal question is involved nor does it appear that said cause arises under the Constitution or any law of the United States.

(10.) Because it appears from the bill that the allegations of the unreasonableness of rates fixed by the State commission and of which *he* complains and seeks relief by injunction is based upon the operating expenses, the interest on the bonded indebtedness and the stock issue of the defendant railway, which complainant alleges the defendant railway should be permitted to earn. That said allegation setting up said claim as a basis of the unreasonableness of the rate is insufficient in equity upon which to grant the relief prayed for.

(11.) That to so much of the allegation of complainant's bill as sets up the invalidity of circular 34, issued by the railroad commission of the State of Texas, which is made a part of said bill, defendants say the same is insufficient in that it does not show that the requirements contained in said circular are unreasonable regulations imposed on defendant company. Nor does it interfere with interstate commerce as alleged.

(12.) That so much of the allegations in complainant's bill as seek to attack the validity of the law creating the railroad commission and prescribing its powers because of combining judicial legislation and executive powers, are insufficient in law or equity upon which to base the relief prayed for.

(13.) That so much of the allegations of complainant's bill as seek to avoid the power of the State to prescribe laws for the Texas & Pacific Railway Company because of having been chartered by the Congress of the United States is insufficient, in this, that the commission law complained of provides that it shall apply to and effect only transportation of passengers, freight, and cars between points within the State of Texas.

(14.) That defendants further demurring, say that this court has no jurisdiction because it appears from the bill and the cross-bill and record generally, that there is a fraudulent combination between complainant and the defendant railroad company to
344 & 345 obtain jurisdiction in this court by creating a diversity of citizenship in order that the defendant company, which is domestic corporation chartered under the laws of Texas, should be enabled to apply for affirmative relief by means of the cross-bill filed by it against these defendants.

(15.) Defendants further demurring say that so much of said bill as sets up want of notice of the time and place of fixing rates by the railroad commission of Texas, is insufficient in law or equity, because it appears by the bill that a notice was given before fixing rates and that defendant railroad company did appear both by the traffic agent and counsel and discuss the rates prior to their being fixed by the commission. And further demurring, defendants say that the want of notice complained of is under a law of the State of Texas and no Federal question arises giving this court jurisdiction to determine its sufficiency.

(16.) Defendants further demurring, say that so much of complainant's bill as sets up that the commission law of Texas is obnoxious to the 14th amendment in not providing due process of law or depriving the defendant railroad of the equal protection of the laws, is insufficient in this, that said objections are not shown by any allegations in said bill to appear upon the face of the law complained of by said complainant and there exists any Federal question arising upon the face of said law by which this court can take jurisdiction.

(17.) That the second paragraph of the amended bill of complaint, in which it is sought to exempt the defendant company from the operation of the laws of Texas, is insufficient in law, because the commission act is expressly confined to the regulation of purely intrastate freight, and because the allegations of said amendment show that the defendant has lawfully contracted with the State of Texas to be governed by its laws, and because the defendant company may not in equity repudiate the said contract without restitution of the property received thereunder.

(18.) That neither the original bill nor its amendment state all the facts and conditions which are necessary to enable this court to determine whether the rates complained of are just and reasonable.

Wherefore, and for divers other errors and imperfections appearing in the said bill of complaint, the defendants pray the judgment of the court whether they shall be compelled to make answer to such parts of said bill as are herein specifically demurred to and prays to be dismissed with their costs in this behalf expended.

C. A. CULBERSON,
H. C. COKE,
W. S. SIMPKINS,
Solicitors for said Defendants.

I, C. A. Culberson, counsel for the defendants in the above cause, do hereby certify that the foregoing demurrer to the bill of complaint is in my opinion well founded in law.

C. A. CULBERSON.

346 UNITED STATES OF AMERICA, }
Western District of Texas. }

I, C. A. Culberson, one of the defendants in the above cause, being duly sworn, do say that the foregoing demurrer to the bill of complaint is not interposed for purposes of delay.

C. A. CULBERSON.

Subscribed and sworn to before me, this the 23rd day of March, 1893.

B. G. DUVAL, *Clerk*,
By D. H. HART, *Deputy*.

(Endorsed:) No. 186. In the United States circuit court for the western district of Texas, at Austin. The Mercantile Trust Company, trustee, complainants, against The Texas and Pacific Railway

Company, John H. Reagan *et als.*, defendants. The demurrer of John H. Reagan, W. P. McLean, L. L. Foster and C. A. Culberson. Filed March 23, 1893. B. G. Duval, clerk, by D. H. Hart, deputy.

347 In the United States Circuit Court for the Western District of Texas, at Austin. In Equity.

THE TEXAS & PACIFIC RAILWAY COMPANY, Cross-complainant,
vs.
THE MERCANTILE TRUST COMPANY, JOHN H. REAGAN, *et als.*, Defendants.

The demurrer of John H. Reagan, W. P. McLean, L. L. Foster, and C. A. Culberson to the cross-bill of above-named cross-complainant as amended.

These defendants, by way of protestation, not confessing or acknowledging all or any of the matters and things in the said cross-bill of said cross-complainant contained to be true in such manner and form as the same are therein set forth and alleged, demur to the said cross-bill and for causes of demurrer show:

That said cross-complainant hath not in and by said bill made or stated such a cause of action as doth or ought to entitle it to any such relief as is thereby sought and prayed for against these defendants. Wherefore, these defendants pray judgment of this honorable court whether they shall be compelled to further answer, and pray to be dismissed with their costs.

And for specific causes of demurrer to the sufficiency of the various allegations of said cross-bill, defendants say:

(1.) That it appears from the allegations of the original bill in this cause that the same cannot be maintained, and said original bill falling, said cross-bill must fall with it. The cross-bill cannot be maintained without the main bill to support it.

(2.) For further grounds of special demurrer to said
348–352 cross-bill, defendants adopt the special demurrers interposed by them in this cause to the original bill, numbered from two to sixteen, inclusive.

3. That neither the cross-complaint nor the amendment states all the facts and conditions which are necessary to enable the court to determine whether the rates complained of are just and reasonable.

4. That the amended cross-complaint, which seeks to exempt the defendant company from the operation of the laws of Texas, is insufficient in law, because the commission act is expressly confined to freight having origin and destination in this State, and because the allegations of said amendment show that the defendant company lawfully contracted with the State of Texas to be bound by its laws, and because said company may not in equity repudiate said contract without restitution of the property received thereunder.

Wherefore, and for divers other errors and imperfections appearing in the said bill of complaint, defendants pray the judg-

ment of the court whether they shall be compelled to make answer to such parts of said cross-bill as are herein specifically demurred to, and pray to be dismissed with their costs in this behalf expended.

C. A. CULBERSON,
H. C. COKE,
W. S. SIMKINS,
Solicitors for said Defendants.

I, C. A. Culberson, counsel for the defendants in the above cause, do hereby certify that the foregoing demurrer to the bill of complaint is in my opinion well founded in law.

C. A. CULBERSON.

UNITED STATES OF AMERICA, }
Western District of Texas. }

I, C. A. Culberson, one of the defendants in the above cause, being duly sworn, do say that the foregoing demurrer to the bill of complaint is not interposed for purposes of delay.

C. A. CULBERSON.

Subscribed and sworn to before me this the 23d day of March, 1893.

B. G. DUVAL, *Clerk*,
By D. H. HART, *Deputy*.

(Endorsed:) No. 186. In the United States circuit court for the western district of Texas, at Austin. The Texas and Pacific Railway Company, cross-complainant, against The Mercantile Trust Company, John H. Reagan, *et al.*, defendants. The demurrer of John H. Reagan, W. P. McLean, L. L. Foster and C. A. Culberson to cross-bill. Filed March 23, 1893. B. G. Duval, clerk, by D. H. Hart, deputy.

353 MERCANTILE TRUST COMPANY
vs.
TEXAS & PACIFIC RAILWAY CO., JNO. H. REAGAN, *et al.* } No. 186. Equity.

Now comes complainant, through Messrs. Farrar, Jones & Kruttschnitt, its solicitors, and sets down the demurrer of defendants Jno. H. Reagan, L. L. Foster, Wm. P. McLean, and Charles A. Culberson to be argued.

March 23, 1893.

Attest:

B. G. DUVAL, *Clerk*,
By D. H. HART, *Deputy*.

[Endorsed:] Rule setting down demurrer to bill of complaint for argument.

354 TEXAS & PACIFIC RAILWAY COMPANY
vs.
MERCANTILE TRUST CO., JNO. H. REAGAN, *et al.* } No. 186. Cross-bill.

Now comes cross-complainant, The Texas & Pacific Railway Company, through Messrs. R. S. Lovett & T. J. Freemen, its solicitors of record, and sets down the demurrer of John H. Reagan, William McLean, L. L. Foster, and Charles A. Culberson to the cross-bill herein for argument.

March 23, 1893.

Attest:

B. G. DUVAL, *Clerk*.
By D. H. HART, *Deputy*.

[Endorsed:] Rule setting down demurrer to cross-bill for argument.

355 MERCANTILE TRUST CO.
vs.
TEXAS AND PACIFIC RAILWAY CO., JNO. H. REAGAN, *et al.* } No. 186.

Now come defendants John H Reagan, Wm. P. McLean, L. L. Foster, and Charles A. Culberson, defendants in the above-entitled cause, through Charles A. Culberson, their solicitor of record herein, and decline further to answer the bill of complaint as amended or cross-bill as amended in the above cause, stand upon their demurrers, and submit said cause to the court for a final decree.

March 23rd, 1893.

Attest:

B. G. DUVAL, *Clerk*.
By D. H. HART, *Deputy*.

[Endorsed:] Rule declining to further answer bill and submitting cause for final decree.

356 In the Circuit Court of the United States, Western District of Texas, Fifth Circuit. In Equity.

THE MERCANTILE TRUST CO., Trustee, Complainants,
vs.
THE TEXAS & PACIFIC R'Y CO. and JOHN H. REAGAN *et al.*, Defendants. } No. 186. Original Bill.

THE TEXAS & PACIFIC RAILWAY COMPANY, Complainants,
vs.
THE MERCANTILE TRUST CO., Trustee, and JOHN H. REAGAN *et al.* Defendants. } Cross-bill.

This cause having been set down for hearing on the pleadings and evidence and being called for hearing thereon, the defendants

John H. Reagan, Wm. P. McLean, L. L. Foster, and Charles A. Culberson presented their motion, on file herein, for leave to withdraw their answers and file demurrers, which motion was granted, conditioned upon the said defendants paying all costs of taking depositions and evidence herein against them to be taxed and for which execution may issue, and on condition that the complainant and cross-complainant have leave to amend before the filing of the demurrers of the said defendant, which leave was granted, and whereupon said amendments were filed and the demurrers of the said defendants were filed to the original bill of complaint and cross-bill in this cause, as also to all amendments thereto, and were, by complainant and cross-complainant, set down for argument by consent, and were by all parties forthwith submitted; and thereupon, in consideration thereof, the court considering that the law is in favor of complainant and cross-complainant, except as to the thirteenth and seventeenth grounds of demurrer to the original bill as amended and as to the thirteenth ground of demurrer to the original bill, adopted as a ground of demurrer to the cross-bill as amended, and as to the fourth ground of de-
357 murrer to the cross-bill as amended, it was therefore ordered, adjudged, and decreed that said demurrers be, and the same are hereby, overruled, except said demurrers above named, which are sustained, and the defendants John H. Reagan, Wm. P. McLean, L. L. Foster, and Charles A. Culberson, having entered of record their refusal to make further answer and the fact that they stood upon their demurrers and all parties submitting the cause for final decree, it is now, upon consideration thereof, ordered, adjudged, and decreed that the bill of complaint, as amended, and the cross-bill of complaint, as amended, in the above-entitled cause, be, and the same are hereby, sustained and taken for confessed; and the said cause coming on further to be heard upon the bill of complaint herein, as amended, and upon the answer of the defendant railway company thereto confessing the same, it is further ordered, adjudged, and decreed as follows, to wit:

First. That the injunctions heretofore issued in this cause be, and the same are hereby, made perpetual; and, accordingly,

Second. That defendant The Texas & Pacific Railway Company be, and it is hereby, perpetually enjoined, restrained, and prohibited from putting or continuing in effect the rates, tariffs, circulars, or orders of the railroad commission of Texas or either or any of them, as described in the bill of complaint herein and in "Exhibit C" thereto and therewith filed, and from charging or continuing to charge the rates specified in said tariffs, circulars, or orders or either or any of them.

Third. It is further ordered, adjudged, and decreed that the defendants The Railroad Commission of Texas and the defendants John H. Reagan, Wm. P. McLean, and L. L. Foster, acting as the railroad commission of Texas, and their successors in office, and the defendant Charles A. Culberson, acting as attorney general of the State of Texas, and his successors in office, be, and they
358 are hereby, perpetually enjoined, restrained, and prohibited

from instituting or authorizing or directing any suit or suits, action or actions, against the defendant railway company for the recovery of any penalties under and by virtue of the provisions of the act of the legislature of the State of Texas approved April 3rd, 1891, and fully described in the bill of complaint, or under or by virtue of any of the said tariffs, orders, or circulars of the said railroad commission of Texas, or any or either of them, or under or by virtue of the said act and the said tariffs, orders, or circulars of said railroad commission, or any or either of them combined; and said defendants, Reagan, McLean, and Foster and The Railroad Commission of Texas, are further perpetually enjoined from certifying any copy or copies of any of said orders, tariffs, or circulars or from delivering, or causing or permitting to be delivered, certified copies of any of said orders, tariffs, or circulars to the said Culberson or any other party, and from furnishing the said Culberson or any other party any information of any character for the purpose of inducing, enabling, or aiding him or any other party to institute or prosecute any suit or suits against the said defendant railway company for the recovery of any penalty or penalties under the said act.

Fourth. It is further ordered, adjudged, and decreed that the said railroad commission of Texas and the said Reagan, McLean, and Foster be perpetually enjoined, restrained, and prohibited from making, issuing, or delivering to the said railway company or causing to be made, issued, or delivered to it any further tariff or tariffs, circular or circulars, order or orders.

Fifth. It is further ordered, adjudged, and decreed that all other individuals, persons, or corporations be, and they are hereby, perpetually enjoined, restrained, and prohibited from instituting or prosecuting any suit or suits against the said railway company for the recovery of any damages, overcharges, penalty, or penalties under or by virtue of the said act or any of its provisions or under and by virtue of the said tariffs, orders, or circulars of the said railroad commission of Texas, or any or either of them, or under and by virtue of the said act and the said tariffs, orders, and circulars or any or either of them combined.

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Sixth. It is further ordered, adjudged, and decreed that all rates, tariffs, circulars, and orders heretofore made and issued by said commission and fully described in "Exhibit C" to the bill of complaint herein be, and they are hereby declared to be, unreasonable, unfair, and unjust as to complainant and cross-complainant, and they are hereby cancelled and declared to be null, void, and of no effect.

Seventh. It is further ordered, adjudged, and decreed that all costs herein be taxed against said defendants Reagan, McLean, and Foster and Culberson and The Railroad Commission of Texas, and that execution may issue therefor.

A. P. McCORMICK, *Cir. Judge.*

Austin, Tex., March 23d, 1893.

[Endorsed:] No. 186. U. S. circuit court, western district of Texas, at Austin. The Mercantile Trust Co., trustee, *vs.* The Texas & Pacific R'y Co., John H. Reagan, & *als.* The Texas & Pacific R'y Co., cross-complainant, *vs.* The Mercantile Trust Co., John H. Reagan; & *als.*, defendants. Final decree. Filed & entered M'ch 23, '93. B. G. Duval, cl'k, by D. H. Hart, d'y.

385 In the Supreme Court of the United States.

THE MERCANTILE TRUST COMPANY, Trustee,
against
THE TEXAS & PACIFIC RAILWAY COMPANY, JOHN H. REAGAN, W. P. MCLEAN, L. L. FOSTER, and C. A. CULBERSON.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Cross-complainant,
against
THE MERCANTILE TRUST COMPANY, Trustee; JOHN H. REAGAN, W. P. MCLEAN, L. L. FOSTER, and C. A. CULBERSON.

The appellants assign the following errors in this case:

1. The court erred in entertaining this suit and entering the decree, because the same as to the attorney general of Texas and the railroad commission is in effect a suit against the State of Texas and inhibited by the XI amendment to the Constitution of the United States.

2. The court erred in rendering the decree against appellants, because the act of the legislature of the State of Texas creating the Railroad Commission of Texas, approved April 3rd, 1891, is in all respects valid and constitutional.

3. The court erred in rendering the decree against appellants in so far as it inhibited the attorney general from instituting suits by authority of and in the name of the State of Texas to enforce said law and to recover the penalties therein provided for.

4. The court erred in rendering the decree against the appellants, The Railroad Commission, prohibiting said commission from hereafter adopting and promulgating any freight rates, because if sections 5, 6, and 7 of the act approved April 3rd, 1891, or either of them are void, the remainder of the law is valid and constitutional.

5. The court erred in entertaining this suit and entering the decree against appellants, because whether the rates fixed by the Railroad Commission of Texas are unreasonable is a legislative and not a judicial question and may not be inquired into except in the manner provided by said act approved April 3rd, 1891.

6. The court erred in entering the decree against appellants because the measure of a reasonable rate, as alleged in the complaint and cross-complaint, is not the legal measure or test thereof.

7. The court erred in rendering the decree against appellants because, as alleged in the complaint and cross-complaint, the rates fixed by the commission are just and reasonable.

C. A. CULBERSON,
HENRY C. COKE,
W. S. SIMPKINS,
Solicitors for Appellants.

(Endorsed:) # 186. The Mercantile Trust Co., trustee, *v.* The Texas and Pacific R'y Co., John H. Reagan, *et al* The Texas and Pacific R'y Co., cross-complainant, *v.* The Mercantile Trust Co., John H. Reagan, *et al.* Assignment of errors. Filed March 7, 1894. D. H. Hart, clerk, by O. H. Millican, deputy.

386 In the United States Circuit Court for the Western District of Texas, at Austin.

THE MERCANTILE TRUST COMPANY, Trustee, Complainant,
v.
TEXAS AND PACIFIC RAILWAY COMPANY, JOHN H. REAGAN, *et al.*, Defendants. } No. 186.

Your petitioners, John H. Reagan, W. P. McLean, L. L. Foster, and C. A. Culberson, defendants in the above-entitled cause, would respectfully represent and show that in said cause pending in the United States circuit court in and for the western district of Texas, at Austin, there was entered on the 23rd day of March, 1893, in said court, a final decree to the prejudice and injury of your petitioner; which said decree is erroneous and inequitable in many particulars.

Wherefore, in order that your petitioners may obtain relief in the premises and have opportunity to show the errors complained of, petitioners pray that they may be allowed an appeal in said cause to the Supreme Court of the United States, and that the proper orders touching the security required of them, if any, may be made.

C. A. CULBERSON,
H. C. COKE,
W. S. SIMPKINS,
Solicitors for Defendants.

The above application for appeal to the Supreme Court of the United States is on this day, to wit, March 2nd, 1894, allowed as prayed for upon defendants entering into bond, within the time and conditioned as the law requires, in the sum of $500.00, payable to complainant and cross-complainant.

T. S. MAXEY, *Judge.*

(Endorsed:) No. 186. The Mercantile Trust Company, trustee, complainant, *v.* The Texas and Pacific Railway Company, John H. Reagan, *et al.*, defendants. Application for appeal. Filed March 7, 1894. D. H. Hart, clerk, by O. H. Millican, deputy.

387–391 Circuit Court of the United States of America for the Western District of Texas, in the 5th Circuit.

THE MERCANTILE TRUST COMPANY, Trustee, Complainant,
vs.
TEXAS AND PACIFIC RAILWAY COMPANY, JOHN H. REAGAN, *et al.*, Defendants.

THE TEXAS & PACIFIC RAILWAY COMPANY, Cross-complainant,
vs.
THE MERCANTILE TRUST COMPANY, Trustee; JOHN H. REAGAN, *et al.*, Defendants.

KNOW all men by these presents that we, John H. Reagan, W. P. McLean, L. L. Foster, and C. A. Culberson, of the city of Austin, Travis county, Texas, and H. G. Askew and E. D. True, are held and firmly bound unto the above-named Mercantile Trust Company and Texas & Pacific Railway Company in the sum of five hundred dollars ($500), to be paid to the said Mercantile Trust Company and Texas and Pacific Railway Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 2nd day of March, in the year of our Lord eighteen hundred and ninety-four.

Whereas the above-named John H. Reagan, W. P. McLean, L. L. Foster, and C. A. Culberson have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit on March 23, 1893, by the judge of the circuit court of the United States for the western district of Texas:

Now, therefore, the condition of this obligation is such that if the above-named John H. Reagan, W. P. McLean, L. L. Foster, and C. A. Culberson shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN H. REAGAN,
W. P. McLEAN,
L. L. FOSTER,
C. A. CULBERSON,
By C. A. CULBERSON, *Solicitor.*
H. G. ASKEW, *Surety.*
E. D. TRUE, *Surety.*

The foregoing bond is approved this the 2nd day of March, A. D. 1894.

T. S. MAXEY, *Judge*.

(Endorsed:) #186. The Mercantile Trust Co., trustee, *v.* The Texas & Pacific R'y Co., John H. Reagan, *et al.* The Texas & Pacific R'y Co., cross-complainant, *v.* The Mercantile Trust Co., John H. Reagan, *et al.* Bond on appeal. Filed March 7, 1894. D. H. Hart, clerk, by O. H. Millican, deputy.

392 In the Supreme Court of the United States.

JOHN H. REAGAN & *als.*
vs.
MERCANTILE TRUST CO. & THE TEXAS & PACIFIC R'Y CO. } No. 1167. October Term, 1893.

In the above entitled and numbered cause it is stipulated and agreed that the following portions of the record and none others shall be printed, viz:

(1.) Caption.
(2.) Bill of complaint.
(3.) Exhibit A.
(4.) Answer of the R'y company.
(5.) Cross-bill.
(6.) Amendment to bill of complaint.
(7.) " " cross-bill.
(8.) Motion to withdraw answer & file demurrer.
(9.) Rule setting down cause on bill and answer.
(10.) Defendants' demurrer to bill.
(11.) " " " cross-bill
(12.) Rules setting down demurrers for argument.
(13.) Rule on defendants declining to further answer, &c.
(14.) Final decree.
(15.) Assignment of errors.
393 (16.) Application for, order granting, and bond on appeal.
(17.) All of Exhibits H & I except following pages, viz:

2 to 21, inclusive.
24 " 27, "
32, 33,
36 – 41, "
52 – 57, "
66 – 69, "
72 – 83, "

Exhibits B & C, as also the opinion of the judge of the lower court, are identical with Exhibits B & C and the opinion of the

judge in suit No. 928, submitted simultaneously herewith, and to which record reference is hereby made.

E. B. KRUTTSCHNITT,
Solicitor for Complainant.
W. S. PIERCE,
Solicitor for Cross-complainant,
By E. B. KRUTTSCHNITT.
C. A. CULBERSON,
For Appellants.

394 [Endorsed:] Case No. 15,551. Supreme Court U. S., October term, 1893. Term No., 1167. John H. Reagan *et al.*, app'ts, *vs.* The Mercantile Trust Co. *et al.* Stipulation to omit parts of record in printing. Filed April 5, 1894.

395 EX. H.

ANNUAL REPORT OF THE TEXAS AND PACIFIC RAILWAY COMPANY TO THE RAILROAD COMMISSIONERS OF THE STATE OF TEXAS FOR THE YEAR ENDING JUNE 30, 1891.

395 (22) *Instructions for Answering Questions on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "none" may be used for a whole page; or a distinct table; or under any column heading; or against any particular item or items, where that word expresses the facts. In other cases, refer by note to this page, as for example, "see page 22," where a brief explanation should be given why specific data called for cannot be returned exactly as requested.

Recapitulation of Funded Debt.—Under this head should be given the totals of the classes of debt returned on page 19, except that under "miscellaneous obligations," should be included "equipment trust obligations," as returned on page 21. The total of accrued interest here given is the amount to be carried to page 31 (or 33), as "interest on funded debt accrued."

Receiver's Certificates.—It is expected, under this heading, that receivers will report not only the certificates which may have been issued since the road for which they report came into their hands, but certificates issued by former receivers as well, if any such remain outstanding.

Current Assets and Liabilities.—Under "assets" it is desired that all assets should be returned which, in the ordinary operation of the property, may be applied to the payment of current liabilities, according to following instructions:

Cash.—State under this heading the total amount of cash in the hands of the treasurer, banks, and other depositories available for use upon demand.

Bills Receivable.—The amount under this heading should represent the value of all *bona fide* and collectible obligations held by the company in the form of bills receivable, or other evidence of moneys loaned, due on demand or at a future date.

Due from Agents.—State the amount due from agents of the company, including conductors and station agents, which is to be remitted as applying to business up to and including June 30.

Net Traffic Balances.—State the amount due from other companies (after deducting the amount due to other companies) on operations up to and including June 30.

Due from Solvent Companies and Individuals.—Under this heading should be stated the amount due from the various sources indicated, payment of which is reasonably assured.

Other Cash Assets.—State the value of other proper cash assets, if any, naming same. Do not include "materials and supplies," "stocks" or "bonds owned" should not be returned under "current assets," but as provided for on page 37 or 39. For "liabilities," the following instructions should be observed:

Receiver's Certificates.—Enter the total from the table on opposite page (23).

Loans and Bills Payable.—State the amount of all loans or bills payable due on or prior to June 30, and which remain unpaid on that date; and also all outstanding loans and bills payable not yet due, or payable on demand.

Audited Vouchers and Accounts.—State the amount of audited vouchers and of accounts applying to the business up to and including June 30, which have been approved for payment at the date of filing the report, or for which a recognized liability against the company exists.

Wages and Salaries.—State the amount of wages and salaries due for services rendered up to and including June 30, and remaining unpaid on that date.

Net Traffic Balances.—State the amount due to other companies (after deducting the amount due from other companies) on operations up to and including June 30.

Dividends not Called for.—State the amount of all dividends remaining unpaid on June 30, which have been declared up to and including that date.

Matured Interest Coupons Unpaid.—State the amount of all interest due and unpaid up to and including June 30; in this amount include also interest falling due as of date July 1.

Rentals Due July 1.—State all sums due for rent of leased roads and other properties up to and including July 1.

Miscellaneous.—State any other unfunded indebtedness not previously specified.

Explanatory Remarks.

Office of railroad commission of Texas, Austin.

Note to Accompany "Annual Report" Form, 1891.

On pages 19, 21, and 23, under "interest," change "amount matured during year" to read "amount paid during year," and return "interest" accordingly under the four tables involved. See, also, the last paragraph but one under "instructions" on page 18. This change applies to the table for "funded debt" on page 19; to the lower table on page 21, "B. Statement of amount;" also to the tables covering "recapitulation of funded debt" and "receiver's certificates" on page 23. For "amount matured during year" please read "amount paid during year" in the last line but one of the second paragraph under "instructions" on page 20.

395 (23) *Recapitulation of Funded Debt.*

Class of debt.	Amount issued.	Amount outstanding.	Interest.	
			Amount accrued during year.	Amount paid during year.
Mortgage bonds—page 19	29,344,778 65	28,915,417 04	1,279,490 00	1,279,190 00
Miscellaneous obligations—page 21	144,334 45	64,950 84	4,582 92	4,582 92
Income bonds—page 19	62,860,034 18	25,343,818 18	None.	None.
Total	92,349,147 28	54,324,186 06	1,284,072 92	1,283,772 92

Receiver's Certificates.

Date issued.	Amount issued.	Amount outstanding	Principal.		Interest.		Rate.
			Amount paid during year.	Amount funded or otherwise disposed of	Amount accrued during year.	Amount matured during year.	
None	None	None	None	None	None		
Total							

Current Assets and Liabilities.

Cash and current assets available for payment of current liabilities.		Current liabilities accrued to and including June 30, 1891.	
Cash	135,718 30	Receiver's certificates	None.
Bills receivable	139,758 36	Loans and bills payable	236,268 71
Due from agents	196,104 82	Audited vouchers and accounts	817,123 42
Net traffic balances due from other companies	None.	Wages and salaries	74,082 55
Due from solvent companies and individuals	280,646 66	Net traffic balances due to other companies	11,204 89
Other cash assets (excluding "materials and supplies")*	28,818 50	Dividends not called for	None.
		Matured interest coupons unpaid (including coupons due July 1)	54,395 00
		Rentals due July 1	None.
		Miscellaneous	50,98 38
Balance—current liabilities	402,146 31	Balance—cash assets	
Total	1,252,172 95	Total	1,252,172 95

*Materials and supplies on hand, $260,019.27.

(See general balance-sheet—page 9).

395 (28) *Instructions for Answering Questions on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "none" may be used for a whole page; or under any column heading; or against any particular item or items, where that word expresses the facts. In other cases, refer by note to this page, as for example, "see page 28," where a brief explanation should be given why specific data called for cannot be returned exactly as requested.

The purpose of the opposite page is to show to what extent permanent improvements have been made upon property and equipment during the year. No charge should be made to this account for renewals or repairs, but only such expenditures as result in a permanent addition or betterment to property.

The amounts charged should be net amounts, that is to say, there should be a deduction from gross expenditures equal to the receipts from sale of property whose use is suspended, or the value of such property. In case credits for any item exceed disbursements, the balance should be entered in red ink, and an allowance made for the same in the footings.

All permanent improvements should be charged to one of the three accounts as provided on opposite page, viz: "Operating expenses," in which case the total should be distributed in said account on pages 43 and 45; "income account," in which case the total should be carried to appropriate item on page 31 (or 33); this column, however, is intended for the use of those roads only with which it is now (or will hereafter be) a custom to charge permanent improvements, wholly or in part, to "income account;" and construction or equipment account. Under the caption "total cost to June 30, 1890," there should be entered the amounts returned as "total cost to June 30, 1889," plus the amounts "charged to construction or equipment." It is these totals that should be returned on the "general balance-sheet," page 49, against the items "cost of road" and "cost of equipment."

Explanatory Remarks.

395 (29) *Cost of Road, Equipment, and Permanent Improvements.*

Item.	Expenditures during year.			Total cost to June 30, 1890.	Total cost to June 30, 1891.	Cost per mile.
	Included in operating expenses.	Not included in operating expenses.				
		Charged to income account as permanent improvements.	Charged to construction or equipment.			
Construction:						
Right of way						
Other real estate		86,660 00				
Fences	31,557 47					
Grading and bridge and culvert masonry	24,401 03					
Bridges and trestles	31,459 53					
Rails	88,882 18					
Ties						
Other superstructure						
Buildings, furniture and fixtures	40,513 72	2,905 56				
Shop machinery and tools		349 00				
Engineering expenses						
Interest during construction						
Discount on securities sold for construction						
Telegraph line						
Wharfing, etc						
Sidings and yard extensions	8,869 12					
Terminal facilities and elevators						
Road built by contract						
Purchase of constructed road						
Other items	71,533 90					
Total construction	297,216 95	89,854 56				
Equipment:						
Locomotives		163,936 00				
Passenger cars		32,203 84				
Sleeping, parlor and dining cars						
Baggage, express and postal cars		3,837 58				
Combination cars						
Freight cars		67,000 00				
Other cars of all classes		6,295 42				
Floating equipment		3,527 61				
Total equipment		276,800 45				
Grand total cost construction, equipment, etc	297,216 95	366,655 01		$80,481,968 31	$81,473,696 80	53,684 46
Total cost construction, equipment, etc., State of Texas	259,551 58	231,355 73				

395 (30) *Instructions for Answering Questions on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "none" may be used for a whole page; or under any column heading; or against any particular item or items, where that word expresses the facts. In other cases, refer by note to this page, as for example, "see page 30," where a brief explanation should be given why specific data called for cannot be returned exactly as requested.

The entries in the "income account" should be taken from the pages indicated after the items called for. Where no pages are referred to, the entries must be taken from the books of the company. It should be remembered that this page is made up on the basis of accruals, and every item should be given as accrued when that is possible; this remark applies equally to amounts returned against "dividends."

Under "other deductions," give only such items as are properly regarded as fixed charges and which are not specified under any of the captions under "deductions from income."

Under "other payments from net income," give only such items as are properly regarded as earnings to the stockholders of the road, other than earnings which are reported as "dividends." In every case, a full explanation should be given below (page 30) of the item entered against this heading.

Under "additions for year," there should be given amounts transferred from other accounts to the surplus; or amounts representing an increase in resources not properly assignable to the earnings of property operated during the year covered by this report, or to income accruing on investments during the year covered by this report.

Under "deductions for year," there should appear amounts transferred from the surplus as shown in "profit and loss" on "general balance-sheet" for the year ending June 30, 1890, to other accounts; or amounts written off resulting from adjustments; or payments not properly chargeable to the operations of property during the year covered by this report.

If amounts returned as "additions for year" or "deductions for year" are considerable, an itemized statement should be given in the blank space below on this page (30).

In order to discover the "profit and loss" "for entry on 'general balance-sheet,' page 51" (or 49), the "profit and loss" from last year's balance-sheet should be combined with the surplus or deficit arising from the operations covered by this year's report. To this total should be added the amount returned against "additions for year;" or there should be deducted the amount returned against "deductions for year." The result will be the "profit and loss" to be carried to the "general balance-sheet," page 51 (or 49).

Explanatory Remarks.

395 (31) *Income Account.*

(From roads making operating reports.)

Gross earnings from operation—page 35	7,288,651 66	
Less operating expenses—page 45	5,497,379 74	
Income from operation		1,791,271 92
Deficit		
Dividends from stocks owned—page 37	None.	
Interest on bonds owned—page 39	2,239 04	
Miscellaneous income, less expenses—page 41	91,331 13	
	11,032 80	
Income from other sources		104,602 97
Total income		1,895,874 89
Deficit		
Deductions from income:		
Interest on funded debt accrued—page 23	1,286,772 92	
Interest on interest-bearing current liabilities accrued, not otherwise provided for	12,345 52	
Rents—page 47, A	13,500 00	
Taxes	190,231 07	
Permanent improvements—Page 29	366,655 01	
Other deductions	5,389 08	
	300 00	
Total deductions from income		1,872,193 60
Net income		23,681 29
Deficit		
Dividends, — per cent., common stock		
Dividends, — per cent., preferred stock		
Other payments from net income		
Total		
Surplus from operations of year ending June 30, 1891		23,681 29
Deficit from operations of year ending June 30, 1891		
Surplus on June 30, 1890 (from "general balance-sheet," 1890 report)		114,357 67
Deficit on June 30, 1890 (from "general balance-sheet," 1890 report		
Additions for year		
Deductions for year		
Surplus on June 30, 1891 (for entry on "general balance-sheet," page 51)		
Deficit on June 30, 1891 (for entry on "general balance-sheet," page 49)		90,676 38

395 (34) *Instructions for Answering Questions on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "none" may be used for a whole page; or under any column heading; or against any particular item or items, where that word expresses the facts. In other cases, refer by note to this page, as for example, "see page 34," where a brief explanation should be given why specific data called for cannot be returned exactly as requested.

This statement should show the actual amount of earnings from the operation of the road during the year for the respective items mentioned. The fact that any part of such earnings has not, at the time of making the report, passed into the treasurer's hands should not preclude the same from being stated here.

It will be observed that this page is arranged to show what deductions are made from the gross receipts before stating the actual earnings from operations which pass to the "income account," page 31. The items of deductions called for are intended to be such moneys as in fact belong to shippers or passengers, and not to the reporting carrier, but which are temporarily in the carrier's hands.

"Commissions" are considered an expense and should not be deducted here. Under "freight—other repayments," cases of refund, for the purpose of equalizing rates upon export traffic with the rates at other cities, should be shown; large amounts of "deductions, account of repayments, etc.," should be explained. The amounts from which deductions are to be made should be entered in the "total receipts" column, and the net amounts, after deductions are subtracted, are to be shown in the last column; items from which no deductions are made are also to be stated in the last column.

The items from which earnings are derived, under the respective headings of "passenger" and "freight," indicate what should be stated for each, with the possible exception of "stock yards" and "elevators." For these items the earnings on this page are only to be shown when directly connected with the operation of the road; also under "other earnings from operation," the earnings from "telegraph" and from "rents not otherwise provided for," are only to be stated when directly connected with the operation of the road. If revenue is received from any of the items mentioned, through a tenant or otherwise, not directly connected with the operation of the road, such revenue should be entered under "miscellaneous income," page 41.

Explanatory Remarks.

395 (35) *Earnings from Operation—State of Texas.*

Item:	Total receipts.	Deductions, account of repayments, etc.	Actual earnings.
Passenger:			
Passenger revenue	1,518,851 04		
Less repayments:			
Tickets redeemed		374 20	
Excess fares refunded		922 80	
Other repayments		1,143 58	
Total deductions		2,440 61	
Total passenger revenue			1,516,410 43
Mail			165,548 44
Express			113,734 50
Extra baggage and storage			36,290 94
Other items			
Total passenger earnings			1,831,984 30
Freight:			
Freight revenue	3,529,380 89		
Less repayments:			
Overcharge to shippers		222,323 49	
Other repayments			
Total deductions		222,323 49	
Total freight revenue			3,307,057 40
Stock yards			3,709 29
Elevators			None.
Other items			14,385 27
Total freight earnings			3,325,151 96
Total passenger and freight earnings			5,157,136 26
Other earnings from operations:			
Car mileage—balance			None.
Switching charges—balance			None.
Telegraph companies			None.
Rent from tracks, yards, and terminals—page 41			42,534 00
Rents not otherwise provided for			743 03
Other sources			None.
Total other earnings			43,277 03
Total gross earnings from operation—Texas			5,200,413 29
Total gross earnings from operation—entire line			7,288,651 66

395 (42) *Instructions for Answering Questions on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "none" may be used for a whole page; or under any column heading; or against any particular item or items, where that word expresses the facts. In other cases, refer by note to this page, as for example, "see page 42," where a brief explanation should be given why specific data called for cannot be returned exactly as requested.

A detailed analysis of "operating expenses" has been issued by the commission, and sent to each road making an operating report. The instructions it contains should be followed in making returns on pages 43 and 45.

For the apportionment of operating expenses between passenger and freight traffic, the following instructions prescribed by the Interstate Commerce Commission should be followed: All expenses which are naturally chargeable to either passenger or freight traffic should be entered in their respective columns; expenses which are not naturally chargeable to either traffic should be apportioned on a mileage basis, making the division as between passenger and freight traffic in the proportion which the passenger and freight train mileage bears to the total mileage of trains earning revenue. This computation should be made from the data furnished under "train mileage," page 61.

"Loss and damage" and "injuries to persons" should be apportioned to the train which occasioned the outlay, passenger or freight, as the fact was.

Mixed trains will continue to be treated for the present as one-fourth passenger and three-fourths freight.

Taxes are not to be stated under "operating expenses," but are to be deducted from income as provided for on page 31 (or 33).

Explanatory Remarks.

395 (43) *Operating Expenses.*

(Apportionment between passenger and freight traffic is estimated according to the rule prescribed by the Interstate Commerce Commission.)

Item.	Chargeable to passenger traffic.	Chargeable to freight traffic.	Total.
Maintenance of way and structures:			
1. Repairs of roadway	169,483 45	508,450 32	677,933 77
2. Renewals of rails	17,668 07	53,004 23	70,672 30
3. Renewals of ties	39,724 90	119,174 72	158,899 62
4. Repairs of bridges and culverts	50,836 88	152,510 62	203,347 50
5. Repairs of fences, road crossings, signs, and cattle-guards	12,101 53	36,304 58	48,406 11
6. Repairs of buildings	11,106 61	33,319 83	44,426 44
7. Repairs of docks and wharves	6,686 56	20,059 69	26,746 25
8. Repairs of telegraph	2,348 50	7,045 52	9,394 02
9. Other expenses	9,163 56	27,490 69	36,654 25
Total	319,120 06	957,360 20	1,276,480 26
Maintenance of equipment:			
10. Repairs and renewals of locomotives	71,333 56	169,775 21	241,108 77
11. Repairs and renewals of passenger cars	73,260 57		73,260 57
12. Repairs and renewals of freight cars		222,242 31	222,242 31
13. Repairs and renewals of ferry-boats, tugs, floats, and barges			
14. Shop machinery, tools, etc	14,570 83	43,712 50	58,283 33
15. Other expenses	5,310 07	15,930 22	21,240 29
Total	164,475 03	451,660 24	616,135 27
Conducting transportation:			
16. Wages of enginemen, firemen, and round-housemen	128,930 22	331,073 59	459,993 81
17. Fuel for locomotives	137,567 69	516,154 74	653,662 43
18. Water supply for locomotives	14,072 33	42,216 97	56,289 30
19. All other supplies for locomotives	47,248 83	76,850 02	124,098 85
20. Wages of other trainmen	75,113 42	252,243 16	327,356 58
21. All other train supplies			
22. Wages of switchmen, flagmen, and watchmen	23,091 13	238,269 26	261,360 39
23. Expense of telegraph, including train-dispatchers and operators	40,108 14	120,670 97	160,779 11
24. Wages of station agents, clerks, and laborers	111,357 63	256,778 46	368,136 09
25. Station supplies	7,117 62	12,254 85	19,372 47
26. Switching charges—balance			
27. Car mileage—balance			
28. Loss and damage	47,477 69	153,066 92	200,544 61
29. Injuries to persons	13,707 20	36,332 86	50,040 06
30. Barges, floats, tugs, ferry-boats, expenses of, including wages, fuel, and supplies	14,527 26	108,183 37	122,710 63
31. Other expenses	130,586 01	293,392 86	423,978 87
Total	788,835 17	2,437,458 03	3,226,293 20

395 (44) *Instructions for Answering Questions on Opposite Page.*

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See "instructions," page 42.

Explanatory Remarks.

395 (45) *Operating Expenses*—Continued.

(Apportionment between passenger and freight traffic is estimated according to the rule prescribed by the Interstate Commerce Commission.)

Item.	Chargeable to passenger traffic.	Chargeable to freight traffic.	Total.
General expenses:			
32. Salaries of officers	9,453 30	28,359 93	37,813 23
33. Salaries of clerks	6,766 31	20,298 94	27,065 25
34. General office expenses and supplies	1,447 90	4,343 73	5,791 63
35. Agencies, including salaries and rent	3,938 71	11,816 14	15,754 85
36. Advertising	11,603 36	15 00	11,618 36
37. Commissions			
38. Insurance	7,084 24	21,252 73	28,336 97
39. Expense of fast-freight lines			
40. Expense of traffic associations			
41. Expense of stock yards and elevators			
42. Rents for tracks, yards, and terminals—page 47 B	13,851 00	41,553 00	55,404 00
43. Rents not otherwise provided for	18,492 73	42,106 95	60,599 68
44. Legal expenses	14,974 89	44,924 66	59,899 55
45. Stationery and printing	10,247 60	23,295 69	33,543 29
46. Other general expenses	10,661 05	31,983 15	42,644 20
Total	108,521 18	269,949 83	378,471 01
Recapitulation of expenses:			
47. Maintenance of way and structures	319,120 06	957,360 20	1,276,480 26
48. Maintenance of equipment	161,475 03	451,660 24	613,135 27
49. Conducting transportation	788,835 17	2,437,458 03	3,226,293 20
50. General expenses	108,521 18	269,949 81	378,471 01
Grand total	1,380,951 44	4,116,428 30	5,497,379 74
Percentage of expenses to earnings—entire line			75.4
Operating expenses—State of Texas—"estimated."			
Maintenance of way and structures	237,744 44	713,233 35	950,977 79
Maintenance of equipment	122,533 00	340,486 00	456,020 80
Conducting transportation	587,682 20	1,815,906 24	2,403,588 43
General expenses	80,848 28	201,112 62	281,960 90
Total	1,028,808 82	3,066,736 10	4,095,547 92
Percentage of expenses to earnings—Texas			78.8

395 (46) *Instructions for Answering Questions on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "none" may be used for a whole page; or a distinct table; or under any column heading; or against any particular item or items, where the word expresses the facts. In other cases, refer by note to this page, as for example, "see page 46," where a brief explanation should be given why specific data called for cannot be returned exactly as requested.

Table "A."

State the amount of rents paid for leased roads and designate whether payment is made by payment of interest on guaranteed bonds, by payment of dividends on guaranteed stocks or by cash payment. Carry the total to the "income account," page 31 (or 33), as deduction from income, charged to "rents."

Table "B."

State the amount of rents paid for lease of other property as called for in the table. Carry the total to "operating expenses," page 45.

Payments for lease of cars or equipment should not be entered on opposite page as "rents paid for lease of other property," but should be returned as prescribed on page 21 of this form.

Explanatory Remarks.

395 (47) RENTALS PAID.

A.—*Rents Paid for Lease of Road.*

Name of road.	Interest on bonds guaranteed.	Dividends on stock guaranteed.	Cash.	Total.
Vicksburg, Shreveport & Pacific	None	None	13,500 00	13,500 00
Total rents—A	None	None	13,500 00	13,500 00

B.—*Rents Paid for Lease of Other Property.*

Designation of property.	Situation of property leased.	Name of company owning property leased.	Item.	Total.
Tracks:	Sierra Blanca to El Paso	Southern Pacific Co.	55,404 00	
Total				55,404 00
Yards:	None		None.	
Total				
Terminals:	None		None.	
Total				
	Grand total rents—B			55,404 00

395 (48) *Instructions for Answering Questions on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "none" may be used for a whole page; or under any column heading; or against any particular item or items, where that word expresses the facts. In other cases, refer by note to this page, as for example, "see page 48," where a brief explanation should be given why specific data called for cannot be returned exactly as requested.

It is the object of pages 49 and 51, by means of a "comparative general balance-sheet," to show the financial changes that have taken place in the financial condition of the road during the year covered by the report. On the left of each page, in first two columns, the balance-sheet as it stood on June 30, 1890, should be given. In the two columns on the right, next following the printed items called for, the balance-sheet as it stood on June 30, 1891, should be given. In the last two columns on the right, should be shown the difference between the items named as returned for the two dates respectively, entered in the proper column, according as that difference shows an "increase" or a "decrease" in the account specified.

In case there is a separate "profit and loss" account for the property returned on page 11, the net result of the year's operations may be entered as a separate item.

In case items entered in columns headed "increase" or "decrease" are due to consolidation or reorganization and the issue of new stocks or new bonds, or to any important financial operation during the year covered by this report, full explanation of the same should be made on page 53 of this form.

Explanatory Remarks.

395 (49) *Comparative General Balance-sheet.*

June 30, 1890.		Assets.	June 30, 1891.		Year ending June 30, 1891.	
Item.	Total.		Item.	Total.	Increase.	Decrease.
	80,481,968 31	Cost of road—page 29 / Cost of equipment—page 29		80,472,006 86		8,961 45
	6,713,115 00	Stocks of other companies owned—page 37		6,735,520 57	22,405 57	
	1,806,132 00	Bonds of other companies owned—page 39		1,803,494 00		2,638 00
	86,600 00	Other permanent investments		None		86,600 00
	135,974 82	Gordon coal mines		136,276 46	301 64	
		Lands owned				
	744,125 06	Cash and current assets—page 23		740,026 64		4,098 42
		Other assets:				
	285,252 69	Materials and supplies		260,019 27		25,233 42
		Sinking fund				
	4,298,962 56	Sundries		4,178,083 79		120,878 77
	114,357 67	Profit and loss		90,676 38		23,681 29
	94,716,488 11	Grand total		94,467,103 97		249,384 14

395 (50) *Instructions for Answering Questions on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "none" may be used for a whole page; or under any column heading; or against any particular item or items, where that word expresses the facts. In other cases, refer by note to this page, as for example, "see page 50," where a brief explanation should be given why specific data called for cannot be returned exactly as requested.

See "instructions," page 48.

In case items entered in columns headed "increase" or "decrease" are due to consolidation or reorganization and the issue of new stocks or new bonds, or to any important financial operation during the year covered by this report, full explanation of the same should be made on page 53 of this form.

Explanatory Remarks.

395 (51) *Comparative General Balance-sheet.*

June 30, 1890.		Liabilities.	June 30, 1891.		Year ending June 30, 1891.	
Item.	Total.		Item.	Total.	Increase.	Decrease.
	38,710,900 00	Capital stock—page 17		38,710,900 00		
	54,269,612 94	Funded debt—page 23		54,259,235 22		10,377 72
	1,490,655 59	Current liabilities—page 23		1,252,172 95		238,482 64
	163,384 17	Accrued interest on funded debt not yet payable.		163,384 17		
	81,935 41	Estimated taxes		81,411 63		523 78
		Profit and loss				
	94,716,488 11	Grand total		94,467,103 97		249,384 14

395 (58) *Instructions for Answering Question on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "none" may be used for a whole page; or under any column heading; or against any particular item or items, where that word expresses the facts. In other cases, refer by note to this page, as for example, "see page 58," where a brief explanation should be given why specific data called for cannot be returned exactly as requested.

In this table, state the specific "number" of each class of employees as determined from the pay-rolls on June 30, 1891; the "total number of days worked," and the "total yearly compensation" should be given for each class of employees named. There should also be given the "average daily compensation" for employees in each class computed according to the following rule: First, ascertain the entire number of days worked by the employees of any class named during the year covered by this report, to be entered under "total number of days worked;" second, ascertain the total compensation paid to the employees of the class during said year, to be entered under "total yearly compensation;" third, divide the "total yearly compensation" by the "total number of days worked," and the quotient will be the "average daily compensation" for working days of the employees in the class named.

Under "distribution of above," data should be given only against the four subheadings printed, and in making the distribution called for, if nothing is to be returned opposite any one or more of these subheadings, the same should be explained briefly, especially when figures are returned on pages 43 and 45 under the four corresponding subheadings of "operating expenses." The four items against each "total" in the lower part of the table should agree exactly with similar entries opposite corresponding "total" above; the same remark applies to data returned against "less 'general officers.'"

Explanatory Remarks.

395 (59) *Employees and Salaries—State of Texas.*

Class.	Number.	Total number of days worked.	Total yearly compensation.	Average daily compensation.
General officers	41	12,833	90,120 42	7 02
General office clerks	156	48,828	110,438 04	2 27
Station agents	101	31,613	93,370 70	2 95
Other station men	207	64,791	129,010 10	1 99
Engineemen	174	54,462	201,222 67	3 69
Firemen	175	54,775	115,892 64	2 11
Conductors	92	28,796	111,929 05	3 89
Other train men	208	65,104	156,117 80	2 39
Machinists	141	44,133	132,568 42	3 00
Carpenters	204	92,922	198,729 60	2 16
Other shop men	133	41,629	133,702 80	3 21
Section foremen	149	46,637	93,7 4 95	2 01
Other trackmen	732	229,116	267,721 60	1 17
Switchmen, flagmen, and watchmen	100	31,300	84,515 70	2 70
Telegraph operators and dispatchers	153	47,859	119,325 15	2 49
Employees—account floating equipment				
All other employees and laborers	454	142,102	198,928 70	1 40
Total (including "general officers")—Texas	3,310	1,036,030	2,237,255 34	2 16
Less "general officers"	41	12,833	90,120 42	
Total (excluding "general officers")—Texas	3,269	1,023,197	2,147,134 92	2 09
Distribution of above:				
General administration	197	61,661	200,558 46	3 25
Maintenance of way and structures	1,144	358,072	502,964 05	1 40
Maintenance of equipment	724	226,612	495,443 03	2 19
Conducting transportation	1,245	389,685	1,038,259 80	2 66
Total (including "general officers")—Texas	3,310	1,036,030	2,237,255 34	2 16
Less "general officers"	41	12,833	90,120 42	
Total (excluding "general officers")—Texas	3,269	1,023,197	2,147,134 92	2 09
Total (including "general officers")—entire line	4,220	1,318,066	2,926,171 80	2 22

395 (60) *Instructions for Answering Questions on Opposite Page.*

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The division of "operating expenses" between passenger and freight traffic, as per pages 43 and 45, together with the ton and passenger mileage, give the bases for arriving at the "estimated cost of carrying each passenger one mile," and "estimated cost of carrying one ton one mile." In computing these items, as well as the "average amount received from each passenger," "average receipts per passenger per mile," "passenger earnings per train-mile," and the corresponding items called for under "freight traffic," the amounts should be carefully figured to five places beyond the decimal point, entries of results being made under the proper heading of "dollars," "cents," and "mills."

Make sure that against "total passenger revenue," "total passenger earnings," and similar items under "freight traffic," are entered the respective amounts returned on page 35 opposite said items; also, in the computation of "passenger earnings per mile of road," "passenger earnings per train-mile," and the corresponding items under "freight traffic," that "total passenger earnings" and "total freight earnings," respectively, are used. In figuring "passenger earnings per mile of road," "freight earnings per mile of road," and the four "per mile of road" items under "passenger and freight," the "total mileage operated" (single track) should in each case be used as returned on page 69 under table "A." In computing "passenger earnings per train-mile," add 25 per cent. of "miles run by mixed trains" to the number of "miles run by passenger trains," to obtain the proper divisor; for "freight earnings per train-mile," add 75 per cent. of "miles run by mixed trains" to the number of "miles run by freight trains."

"Miles run by switching trains" may be given according to the method heretofore in use, or such other method as shall be considered most accurate. State upon this page (60) the process pursued in ascertaining mileage of switching trains.

Explanatory Remarks.

395 (61) — *Passenger and Freight and Train Mileage—State of Texas.*

Item.	Column for tonnage, number passengers, number trains, mileage, number cars.	Columns for revenue and rates: Dollars.	Cts.	Mills.
Passenger traffic:				
Number of passengers carried earning revenue	976,622			
Number of passengers carried one mile	60,082,362			
Average distance carried	61.5			
Total passenger revenue—page 35		1,516,410	43	
Average amount received from each passenger		1	55	27
Average receipts per passenger per mile			02	52
Estimated cost of carrying each passenger one mile			01	71
Total passenger earnings—page 35		1,831,984	30	
Passenger earnings per mile of road		1,616	93	23
Passenger earnings per train mile		1	23	29
Freight traffic:				
Number of tons carried of freight earning revenue	1,057,303			
Number of tons carried one mile	296,146,046			
Average distance haul of one ton	280.1			
Total freight revenue—page 35		3,307,057	40	
Average amount received for each ton of freight		3	14	50
Average receipts per ton per mile			01	12
Estimated cost of carrying one ton one mile			01	04
Total freight earnings—page 35		3,325,151	96	
Freight earnings per mile of road		2,934	82	08
Freight earnings per train mile		1	31	86
Passenger and freight:				
Passenger and freight revenue—page 35		4,823,467	83	
Passenger and freight revenue per mile of road		4,257	25	31
Passenger and freight earnings—page 35		5,157,136	26	
Passenger and freight earnings per mile of road		4,551	75	31
Gross earnings from operation—page 35		5,200,413	29	
Gross earnings from operation per mile of road		4,589	95	
Expenses—page 45		4,095,547	92	
Expenses per mile of road		3,614	78	19
Train mileage:				
Miles runs by passenger trains	1,477,761			
Miles run by freight trains	2,521,813			
Miles run by mixed trains				
Total mileage trains earning revenue	3,999,574			
Miles run by switching trains	696,725			
Miles run by construction and other trains	105,097			
Grand total train mileage	4,801,396			
Mileage of loaded freight cars—north or east	11,199,595			
Mileage of loaded freight cars—south or west	18,962,153			
Mileage of empty freight cars—north or east	10,826,241			
Mileage of empty freight cars—south or west	3,056,345			
Average number of freight cars in train	17.46			
Average number of loaded cars in train	11.99			
Average number of empty cars in train	5.50			
Average number of tons of freight in train	117.43			
Average number of tons of freight in each loaded car	9.82			

395 (62) *Instructions for Answering Questions on Opposite Page.*

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See "instructions," page 60, observing that references to "page 35" in the second paragraph do not apply to filling out page 63, unless data returned on page 35 of the Annual Report to the Interstate Commerce Commission is used.

Explanatory Remarks.

395 (63) *Passenger and Freight and Train Mileage—Entire Line.*

Item.	Column for tonnage, number passengers, number trains, mileage, number cars.	Columns for revenue and rates. Dollars.	Cts.	Mills.
Passenger traffic:				
Number of passengers carried earning revenue	1,292,464			
Number of passengers carried one mile	72,792,564			
Average distance carried	56.3			
Total passenger revenue		1,939,028	46	
Average amount received from each passenger		1	50	03
Average receipts per passenger per mile			02	66
Estimated cost of carrying each passenger one mile			01	88
Total passenger earnings		2,358,943	25	
Passenger earnings per mile of road		1,573	67	79
Passenger earnings per train mile		1	30	69
Freight traffic:				
Number of tons carried of freight earning revenue	1,554,862			
Number of tons carried one mile	379,674,413			
Average distance haul of one ton	244.2			
Total freight revenue		4,857,269	22	
Average amount received for each ton of freight		3	12	39
Average receipts per ton per mile			01	28
Estimated cost of carrying one ton one mile			01	07
Total freight earnings		4,875,363	78	
Freight earnings per mile of road		3,254	42	09
Freight earnings per train mile		1	59	34
Passenger and freight:				
Passenger and freight revenue		6,796,297	68	
Passenger and freight revenue per mile of road		4,533	88	77
Passenger and freight earnings		7,234,307	03	
Passenger and freight earnings per mile of road		4,826	08	88
Gross earnings from operation		7,288,651	66	
Gross earnings from operation per mile of road		4,862	34	27
Expenses		5,497,379	74	
Expenses per mile of road		3,667	36	47
Train mileage:				
Miles run by passenger trains	1,805,092			
Miles run by freight trains	3,059,617			
Miles run by mixed trains				
Total mileage trains earning revenue	4,864,619			
Miles run by switching trains	867,139			
Miles run by construction and other trains	148,675			
Grand total train mileage	5,880,433			
Mileage of loaded freight cars—north or east	16,407,950			
Mileage of loaded freight cars—south or west	25,263,936			
Mileage of empty freight cars—north or east	12,974,165			
Mileage of empty freight cars—south or west	4,167,249			
Average number of freight cars in train	16.25			
Average number of loaded cars in train	13.65			
Average number of empty cars in train	5.60			
Average number of tons of freight in train	124.09			
Average number of tons of freight in each loaded car	9.09			

395 (64) *Instructions for Answering Questions on Opposite Page.*

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This page calls for a statement of the total tonnage carried by each road of the various commodities mentioned, company's material excluded. It will be observed that the table calls for the names of any important commodities which are carried by the roads and which are not specifically provided for in the form. The object of the second column ("freight originating on this road") is to enable the commission to obtain the total movement throughout the country of the commodities named. Each carrier should report in this column the tonnage of all traffic which originates at any and every point on its line. All traffic which is received from rail or water connections directly, whether through elevators or other methods of transfer, and the initial movement of which has been on the line of other carriers, should be given in the next column. Each carrier supplying the data called for by this table should adopt such methods as will prevent the same traffic being reported as originating on more than one line. The second column is intended to show only the initial movement of the traffic.

The percentage should be computed to show what proportion the total tonnage of each commodity bears to the total tonnage of all commodities carried.

Explanatory Remarks.

395 (65) *Freight Traffic Movement—State of Texas.*

(Company's material excluded.)

Commodity.		Freight originating on this road.	Freight received from connecting roads and other carriers.	Total freight tonnage.	
		Whole tons.	Whole tons.	Whole tons.	Per cent.
Products of agriculture.	Grain, Flour, Other mill products, Hay, Tobacco	40,035	31,946	71,981	.0681
	Cotton	87,851	23,617	111,468	.1054
	Fruit and vegetables, Other articles	60,402	16,309	76,711	.0725
Products of animals.	Live stock	65,220	18,700	83,920	.0784
	Dressed meats, Other packing-house products, Poultry, game, and fish	.....	8,120	8,120	.0077
	Wool, Hides and leather	4,972	.....	4,972	.0047
Products of mines.	Anthracite coal, Bituminous coal, Coke	28,439	57,744	86,183	.0815
	Ores, Stone, sand, and other like articles	5,065	4,083	9,148	.0096
Products of forest.	Lumber	181,973	14,855	196,828	.1861
	Other articles	52,020	8,535	60,055	.0573
Manufactures.	Petroleum and other oils, Sugar, Naval stores, Iron—pig and bloom, Iron and steel rails, Other castings and machinery, Bar and sheet metal, Cement, brick, and lime, Agricultural implements, Wagons, carriages, tools, etc., Wines, liquors, and beers, Household goods and furniture	435	1,327	1,762	.0017
Merchandise and manufactures		58,499	209,923	270,422	.2454
Miscellaneous—Other commodities not mentioned above		52,980	33,253	86,233	.0816
Total tonnage—Texas		637,891	419,412	1,057,303	1.0000
Total tonnage—entire line		1,016,610	538,247	1,554,862	

395 (70) *Instructions for Answering Questions on Opposite Page.*

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Under "consumption of fuel by locomotives," the ton of two thousand pounds should be used in reporting coal. In stating the total tonnage of fuel consumed, the tonnage of wood is to be estimated as follows: Hard wood, one and one-half cords to be equivalent to one ton of coal; soft wood, two cords to be equivalent to one ton of coal. In stating "average cost at distributing point," different points may be named if desired, giving the cost at each.

Explanatory Remarks.

Renewals of Rails and Ties—State of Texas.

New rails laid during year.				New ties laid during year.		
Kind.	Tons.	Weight per yard.	Average price per ton at distributing point.	Kind.	Number.	Average price at distributing point.
Iron	None	None	None	Oak	284,631	.28
Total iron	None	None	None	Pine	168,753	.285
Steel	2,738	63 lbs.	38 73	Cypress	122	.32
Total steel	2,738	63 lbs.	38 73	Total	453,506	.2814

Consumption of Fuel by Locomotives—State of Texas.

Locomotives.	Coal—tons.		Wood—cords.		Total fuel consumed—tons.	Miles run.	Average pounds consumed per mile.
	Anthracite.	Bituminous.	Hard.	Soft.			
Passenger	None	40,492.26	1,431	None	41,446.26	14,967.69	55.38
Freight	None	138,785.68	4,280.35	None	141,643.25	25,665.76	110.48
Switching	None	15,786.50	None	None	15,786.50	6,972.25	45.28
Construction	None	3,467.50	None	None	3,467.50	1,493.73	46.43
Total	None	198,531.94	5,717.35		302,343.51	49,099.43	82.40
Average cost at distributing point	None	.275	.225				

396 EXHIBIT I.

ANNUAL REPORT OF THE TEXAS AND PACIFIC RAILWAY COMPANY TO THE RAILROAD COMMISSIONERS OF THE STATE OF TEXAS FOR THE YEAR ENDING JUNE 30, 1892.

396 (22) *Instructions for Answering Questions on Opposite Page.*

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Recapitulation of Funded Debt.—Under this head should be given the totals of the classes of debt returned on page 19, except that under "miscellaneous obligations," should be included "equipment trust obligations," as returned on page 21. The total of accrued interest here given is the amount to be carried to page 31 (or 33), as "interest on funded debt accrued."

Receiver's Certificates.—It is expected, under this heading, that receivers will report not only the certificates which may have been issued since the road for which they report came into their hands, but certificates issued by former receivers as well, if any such remain outstanding.

Current Assets and Liabilities.—Under "assets" it is desired that all assets should be returned which, in the ordinary operation of the property, may be applied to the payment of current liabilities, according to following instructions:

Cash.—State under this heading the total amount of cash in the hands of the treasurer, banks, and other depositories available for use upon demand.

Bills Receivable.—The amount under this heading should represent the value of all *bona fide* and collectible obligations held by the company in the form of bills receivable, or other evidence of moneys loaned, due on demand or at a future date.

Due from Agents.—State the amount due from agents of the company, including conductors and station agents, which is to be remitted as applying to business up to and including June 30.

Net Traffic Balances.—State the amount due from other companies (after deducting the amount due to other companies) on operations up to and including June 30.

Due from Solvent Companies and Individuals.—Under this heading should be stated the amount due from the various sources indicated, payment of which is reasonably assured.

Other Cash Assets.—State the value of other proper cash assets, if any, naming same. Do not include "materials and supplies." "Stocks" or "bonds owned" should not be returned under "current assets," but as provided for on page 37 or 39. For "liabilities," the following instructions should be observed:

Receiver's Certificates.—Enter the total from the table on opposite page (23).

Loans and Bills Payable.—State the amount of all loans or bills payable due on or prior to June 30, and which remain unpaid on that date; and also all outstanding loans and bills payable not yet due, or payable on demand.

Audited Vouchers and Accounts.—State the amount of audited vouchers and of accounts applying to the business up to and including June 30, which have been approved for payment at the date of filing the report, or for which a recognized liability against the company exists.

Wages and Salaries.—State the amount of wages and salaries due for services rendered up to and including June 30, and remaining unpaid on that date.

Net Traffic Balances.—State the amount due to other companies (after deducting the amount due from other companies) on operations up to and including June 30.

Dividends not Called for.—State the amount of all dividends remaining unpaid on June 30, which have been declared up to and including that date.

Matured Interest Coupons Unpaid.—State the amount of all interest due and unpaid up to and including June 30; in this amount include also interest falling due as of date July 1.

Rents Due July 1.—State all sums due for rent of leased roads and other properties up to and including July 1.

Miscellaneous.—State any other unfunded indebtedness not previously specified.

Explanatory Remarks.

396 (23) *Recapitulation of Funded Debt.*

Class of debt.	Amount issued.	Amount outstanding.	Interest.	
			Amount accrued during year.	Amount paid during year.
Mortgage bonds—page 19	29,178,908 70	28,913,648 89	1,279,490 00	1,277,140 00
Miscellaneous obligations—page 21	280,018 71	143,295 45	Charged to new equipment.	(Expenses) and in prior years.
Income bonds—page 19	63,027,951 68	25,333,105 98	None.	None.
Total	92,486,879 09	54,390,050 32	1,279,490 00	1,277,140 00

Receiver's Certificates.

Date issued.	Amount issued.	Amount outstanding.	Principal.		Interest.		Rate.
			Amount paid during year.	Amount funded or otherwise disposed of.	Amount accrued during year.	Amount paid during year.	
	None	None	None	None	None	None	
Total.							

Current Assets and Liabilities.

Cash and current assets available for payment of current liabilities.		Current liabilities accrued to and including June 30, 1891.	
Cash	96,534 93	Receiver's certificates	None.
Bills receivable	136,108 85	Loans and bills payable	215,000 00
Due from agents	204,613 16	Audited vouchers and accounts	1,148,196 80
Net traffic balances due from other companies	None.	Wages and salaries	64,273 26
Due from solvent companies and individuals	394,027 07	Net traffic balances due to other companies	27,443 64
Other cash assets (excluding "materials and supplies")*	74,039 11	Dividends not called for	None.
		Matured interest coupons unpaid (including coupons due July 1)	56,715 00
		Rents due July 1	None.
		Miscellaneous	111,755 83
Balance—current liabilities	717,365 41	Balance—cash assets	
Total	1,622,684 53	Total	1,622,684 53

* Materials and supplies on hand, $287,172.09.

(see general balance-sheet—page 10.)

396 EXHIBIT I.

ANNUAL REPORT OF THE TEXAS AND PACIFIC RAILWAY COMPANY TO THE RAILROAD COMMISSIONERS OF THE STATE OF TEXAS FOR THE YEAR ENDING JUNE 30, 1892.

396 (22) *Instructions for Answering Questions on Opposite Page.*

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Recapitulation of Funded Debt.—Under this head should be given the totals of the classes of debt returned on page 19, except that under "miscellaneous obligations," should be included "equipment trust obligations," as returned on page 21. The total of accrued interest here given is the amount to be carried to page 31 (or 33), as "interest on funded debt accrued."

Receiver's Certificates.—It is expected, under this heading, that receivers will report not only the certificates which may have been issued since the road for which they report came into their hands, but certificates issued by former receivers as well, if any such remain outstanding.

Current Assets and Liabilities.—Under "assets" it is desired that all assets should be returned which, in the ordinary operation of the property, may be applied to the payment of current liabilities, according to following instructions:

Cash.—State under this heading the total amount of cash in the hands of the treasurer, banks, and other depositories available for use upon demand.

Bills Receivable.—The amount under this heading should represent the value of all *bona fide* and collectible obligations held by the company in the form of bills receivable, or other evidence of moneys loaned, due on demand or at a future date.

Due from Agents.—State the amount due from agents of the company, including conductors and station agents, which is to be remitted as applying to business up to and including June 30.

Net Traffic Balances.—State the amount due from other companies (after deducting the amount due to other companies) on operations up to and including June 30.

Due from Solvent Companies and Individuals.—Under this heading should be stated the amount due from the various sources indicated, payment of which is reasonably assured.

Other Cash Assets.—State the value of other proper cash assets, if any, naming same. Do not include "materials and supplies." "Stocks" or "bonds owned" should not be returned under "current assets," but as provided for on page 37 or 39. For "liabilities," the following instructions should be observed:

Receiver's Certificates.—Enter the total from the table on opposite page (23).

Loans and Bills Payable.—State the amount of all loans or bills payable due on or prior to June 30, and which remain unpaid on that date; and also all outstanding loans and bills payable not yet due, or payable on demand.

Audited Vouchers and Accounts.—State the amount of audited vouchers and of accounts applying to the business up to and including June 30, which have been approved for payment at the date of filing the report, or for which a recognized liability against the company exists.

Wages and Salaries.—State the amount of wages and salaries due for services rendered up to and including June 30, and remaining unpaid on that date.

Net Traffic Balances.—State the amount due to other companies (after deducting the amount due from other companies) on operations up to and including June 30.

Dividends not Called for.—State the amount of all dividends remaining unpaid on June 30, which have been declared up to and including that date.

Matured Interest Coupons Unpaid.—State the amount of all interest due and unpaid up to and including June 30; in this amount include also interest falling due as of date July 1.

Rents Due July 1.—State all sums due for rent of leased roads and other properties up to and including July 1.

Miscellaneous.—State any other unfunded indebtedness not previously specified.

Explanatory Remarks.

386 (23) *Recapitulation of Funded Debt.*

Class of debt.	Amount issued.	Amount outstanding.	Interest.	
			Amount accrued during year.	Amount paid during year.
Mortgage bonds—page 19	29,178,968 70	28,913,648 89	1,279,490 00	1,277,140 00
Miscellaneous obligations—page 21	280,018 71	143,295 45	Charged to new equipment.	(Expenses) and in prior years.
Income bonds—page 19	63,027,951 68	25,333,105 98	None.	None.
Total	92,486,879 09	54,390,050 32	1,279,490 00	1,277,140 00

Receiver's Certificates.

Date issued.	Amount issued.	Amount outstanding.	Principal.		Interest.		Rate.
			Amount paid during year.	Amount funded or otherwise disposed of.	Amount accrued during year.	Amount paid during year.	
	None	None	None	None	None	None	
Total							

Current Assets and Liabilities.

Cash and current assets available for payment of current liabilities.		Current liabilities accrued to and including June 30, 1891.	
Cash	96,524 93	Receiver's certificates	None.
Bills receivable	136,108 85	Loans and bills payable	215,000 00
Due from agents	204,614 16	Audited vouchers and accounts	1,148,196 80
Net traffic balances due from other companies	None.	Wages and salaries	64,273 26
Due from solvent companies and individuals	394,027 07	Net traffic balances due to other companies	27,443 64
Other cash assets (excluding "materials and supplies")*	74,059 11	Dividends not called for	None.
		Matured interest coupons unpaid (including coupons due July 1)	56,715 00
		Rents due July 1	None.
		Miscellaneous	111,755 83
Balance—current liabilities	717,365 41	Balance—cash assets	
Total	1,622,684 53	Total	1,622,684 53

* Materials and supplies on hand, $287,172.09.

(See general balance-sheet—page 9).

396 (28) *Instructions for Answering Questions on Opposite Page*

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The purpose of the opposite page is to show to what extent permanent improvements have been made upon property and equipment during the year. No charge should be made to this account for renewals or repairs, but only such expenditures as result in a permanent addition or betterment to property.

The amounts charged should be net amounts, that is to say, there should be a deduction from gross expenditures equal to the receipts from sale of property whose use is suspended, or the value of such property. In case credits for any item exceed disbursements, the balance should be entered in red ink, and an allowance made for the same in the footings.

All permanent improvements should be charged to one of the three accounts as provided on opposite page, viz: "Operating expenses," in which case the total should be distributed in said account on pages 43 and 45; "income account," in which case the total should be carried to appropriate item on page 31 (or 33); this column, however, is intended for the use of those roads only with which it is now (or will hereafter be) a custom to charge permanent improvements, wholly or in part, to "income account;" and construction or equipment account. Under the caption "total cost to June 30, 1892," there should be entered the amounts returned as "total cost to June 30, 1891," plus the amounts "charged to construction or equipment." It is these totals that should be returned on the "general balance-sheet," page 49, against the items "cost of road" and "cost of equipment."

Explanatory Remarks.

396 (29) *Cost of Road, Equipment, and Permanent Improvements.*

Item.	Expenditures during year.			Total cost to June 30, 1891.	Total cost to June 30, 1892.	Cost per mile.
	Included in operating expenses.	Not included in operating expenses.				
		Charged to income account as permanent improvements.	Charged to construction or equipment.			
Construction:						
Right of way	None.					
Other real estate	750 00					
Fences	24,196 89					
Grading and bridge and culvert masonry	87,182 90					
Bridges and trestles	35,981 32					
Rails	88,308 97					
Ties						
Other superstructure	8,597 52					
Buildings, furniture and fixtures	41,934 05	97,680 23				
Shop machinery and tools	2,428 98	4,311 40				
Engineering expenses						
Interest during construction						
Discount on securities sold for construction						
Telegraph line						
Wharfing, etc	349 57					
Sidings and yard extensions	20,478 63					
Terminal facilities and elevators	2,987 67	57,358 66				
Road built by contract						
Purchase of constructed road						
Other items	10,972 77					
Total construction	368,209 27	160,350 29				
Equipment:						
Locomotives	600 00	72,000 00				
Passenger cars		7,721 40				
Sleeping, parlor and dining cars						
Baggage, express and postal cars						
Combination cars						
Freight cars	41,796 20	59,000 00				
Other cars of all classes	6,853 58					
Floating equipment	2,005 80	1,996 70				
Total equipment	51,255 58	140,718 10				
Grand total cost construction, equipment, etc	379,524 85	310,974 39		80,473,066 86	80,523,840 94	53,718 37
Total cost construction, equipment, etc., State of Texas	294,234 29	183,461 49				

396 (30) *Instructions for Answering Questions on Opposite Page.*

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The entries in the "income account" should be taken from the pages indicated after the items called for. Where no pages are referred to, the entries must be taken from the books of the company. It should be remembered that this page is made up on the basis of accruals, and every item should be given as accrued when that is possible; this remark applies equally to amounts returned against "dividends."

Under "other deductions," give only such items as are properly regarded as fixed charges and which are not specified in any of the captions under "deductions from income." An itemized statement should also be furnished below (page 30) of any amount returned against this caption.

Under "other payments from net income," give only such items as are properly regarded as earnings to the stockholders of the road, other than earnings which are reported as "dividends." In every case, a full explanation should be given below (page 30) of the item entered against this heading.

Under "additions for year," there should be given amounts transferred from other accounts to the surplus; or amounts representing an increase in resources not properly assignable to the earnings of property operated during the year covered by this report, or to income accruing on investments during the year covered by this report.

Under "deductions for year," there should appear amounts transferred from the surplus as shown in "profit and loss" on "general balance-sheet" for the year ending June 30, 1891, to other accounts; or amounts written off resulting from adjustments; or payments not properly chargeable to the operations of property during the year covered by this report.

If amounts returned as "additions for year" or "deductions for year" are considerable, an itemized statement should be given in the blank space below on this page (30).

In order to discover the "profit and loss" "for entry on 'general balance-sheet,' page 51" (or 49), the "profit and loss" from last year's balance-sheet should be combined with the surplus or deficit arising from the operations covered by this year's report. To this total should be added the amount returned against "additions for year;" or there should be deducted the amount returned against "deductions for year." The result will be the "profit and loss" to be carried to the "general balance-sheet," page 51 (or 49).

Explanatory Remarks.

396 (31) *Income Account.*

(From roads making operating reports.)

Gross earnings from operation—page 35	7,110,999 91	
Less operating expenses—page 45	5,773,507 01	
Income from operation		1,337,492 90
Deficit		
Dividends on stocks owned—page 37	None.	
Interest on bonds owned—page 39	250 00	
Miscellaneous income, less expenses—page 41	40,285 95	
Other income	18,141 94	
Income from other sources		58,677 89
Total income		1,396,170 79
Deficit		
Deductions from income:		
Interest on funded debt accrued—page 23	1,279,490 00	
Interest on interest-bearing current liabilities accrued, not otherwise provided for	11,084 21	
Rents—page 47, A	13,500 00	
Taxes	187,585 04	
Permanent improvements—Page 29	310,074 39	
Other deductions	27,568 38	
Total deductions from income		1,829,302 02
Net income		
Deficit		433,131 23
Dividends, — per cent., common stock	None.	
Dividends, — per cent., preferred stock	None.	
Other payments from net income	None.	
Total		
Surplus from operations of year ending June 30, 1892		
Deficit from operations of year ending June 30, 1892		433,131 23
Surplus on June 30, 1891 (from "general balance-sheet," 1891 report)		
Deficit on June 30, 1891 (from "general balance-sheet," 1891 report		90,676 38
Additions for year		
Deductions for year		
Surplus on June 30, 1892 (for entry on "general balance-sheet," page 51)		
Deficit on June 30, 1892 (for entry on "general balance-sheet," page 49)		523,807 61

396 (34) *Instructions for Answering Questions on Opposite Page.*

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This statement should show the actual amount of earnings from the operation of the road during the year for the respective items mentioned. The fact that any part of such earnings has not, at the time of making the report, passed into the treasurer's hands should not preclude the same from being stated here.

It will be observed that this page is arranged to show what deductions are made from the gross receipts before stating the actual earnings from operations which pass to the "income account," page 31. The items of deductions called for are intended to be such moneys as in fact belong to shippers or passengers, and not to the reporting carrier, but which are temporarily in the carrier's hands.

"Commissions" are considered an expense and should not be deducted here. Under "freight—other repayments," cases of refund, for the purpose of equalizing rates upon export traffic with the rates at other cities, should be shown; large amounts of "deductions, account of repayments, etc.," should be explained. The amounts from which deductions are to be made should be entered in the "total receipts" column, and the net amounts, after deductions are subtracted, are to be shown in the last column; items from which no deductions are made are also to be stated in the last column.

The items from which earnings are derived, under the respective headings of "passenger" and "freight," indicate what should be stated for each, with the possible exception of "stock yards" and "elevators." For these items the earnings on this page are only to be shown when directly connected with the operation of the road; also under "other earnings from operation," the earnings from "telegraph" and from "rents not otherwise provided for," are only to be stated when directly connected with the operation of the road. If revenue is received from any of the items mentioned, through a tenant or otherwise, not directly connected with the operation of the road, such revenue should be entered under "miscellaneous income," page 41.

Explanatory Remarks.

396 (35) *Earnings from Operation—State of Texas.*

Item.	Total receipts.	Deductions, account of repayments, etc.	Actual earnings.
Passenger:			
Passenger revenue	1,465,814 46		
Less repayments:			
Tickets redeemed		872 40	
Excess fares refunded		2,869 90	
Other repayments		8,019 90	
Total deductions		11,762 20	
Total passenger revenue			1,454,052 26
Mail			166,148 42
Express			107,666 75
Extra baggage and storage			11,395 90
Other items			
Total passenger earnings			1,739,263 33
Freight:			
Freight revenue	3,393,200 26		
Less repayments:			
Overcharge to shippers		412,403 31	
Other repayments			
Total deductions		412,403 31	
Total freight revenue			2,980,796 95
Stock yards			1,968 31
Elevators			None.
Other items			31,325 62
Total freight earnings			3,014,090 88
Total passenger and freight earnings			4,753,354 21
Other earnings from operations:			
Car mileage—balance			None.
Switching charges—balance			None.
Telegraph companies			None.
Rent- from tracks, yards, and terminals—page 41			42,534 00
Rents not otherwise provided for			668 85
Other sources			None.
Total other earnings			43,202 95
Total gross earnings from operation—Texas			4,796,557 16
Total gross earnings from operation—entire line			7,110,999 91

396 (42) *Instructions for Answering Questions on Opposite Page.*

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A detailed analysis of "operating expenses" has been issued by the commission, and sent to each road making an operating report. The instructions it contains should be followed in making returns on pages 43 and 45.

For the apportionment of operating expenses between passenger and freight traffic, the following instructions prescribed by the Interstate Commerce Commission should be followed: All expenses which are naturally chargeable to either passenger or freight traffic should be entered in their respective columns; expenses which are not naturally chargeable to either traffic should be apportioned on a mileage basis, making the division as between passenger and freight traffic in the proportion which the passenger and freight train mileage bears to the total mileage of trains earning revenue. This computation should be made from the data furnished under "train mileage," page 61.

"Loss and damage" and "injuries to persons" should be apportioned to the train which occasioned the outlay, passenger or freight, as the fact was.

Mixed trains will continue to be treated for the present as one-fourth passenger and three-fourths freight.

Taxes are not to be stated under "operating expenses," but are to be deducted from income as provided for on page 31 (or 33).

Explanatory Remarks.

396 (43) *Operating Expenses.*

(Apportionment between passenger and freight traffic is estimated according to the rule prescribed by the Interstate Commerce Commission.)

Item.	Chargeable to passenger traffic.	Chargeable to freight traffic.	Total.
Maintenance of way and structures:			
1. Repairs of roadway	155,112 17	465,336 49	620,448 66
2. Renewals of rails	21,003 50	63,010 50	84,014 00
3. Renewals of ties	52,229 70	156,689 10	208,918 80
4. Repairs of bridges and culverts	52,762 48	158,287 45	211,049 93
5. Repairs of fences, road crossings, signs, and cattle-guards	13,910 64	41,731 93	55,642 57
6. Repairs of buildings	34,092 29	95,951 68	130,043 97
7. Repairs of docks and wharves	14,120 43	42,361 28	56,481 71
8. Repairs of telegraph	2,729 49	8,188 45	10,917 94
9. Other expenses	17,049 33	51,147 97	68,197 30
Total	363,010 03	1,082,704 85	1,445,714 88
Maintenance of equipment:			
10. Repairs and renewals of locomotives	82,886 62	231,909 93	314,796 55
11. Repairs and renewals of passenger cars	96,659 08		96,659 08
12. Repairs and renewals of freight cars		278,651 01	278,651 01
13. Repairs and renewals of ferry-boats, tugs, floats, and barges	59 15	177 45	236 60
14. Shop machinery, tools, etc	11,408 14	34,224 43	45,632 57
15. Other expenses	7,270 03	21,810 09	29,080 12
Total	198,283 02	566,772 91	765,055 93
Conducting transportation:			
16. Wages of enginemen, firemen, and round-housemen	108,060 29	259,045 09	367,105 38
17. Fuel for locomotives	150,611 35	546,993 45	697,604 80
18. Water supply for locomotives	26,597 90	87,793 68	114,391 58
19. All other supplies for locomotives	8,033 34	22,181 62	30,214 96
20. Wages of other trainmen	77,490 23	242,979 71	320,469 94
21. All other train supplies	42,003 87	52,283 16	94,287 03
22. Wages of switchmen, flagmen, and watchmen	31,347 46	94,042 40	125,389 86
23. Expense of telegraph, including train-dispatchers and operators	41,883 56	125,902 95	167,786 51
24. Wages of station agents, clerks, and laborers	80,923 02	309,355 73	390,278 75
25. Station supplies	7,188 54	11,536 59	18,725 13
26. Switching charges—balance	19,173 88	57,521 63	76,695 51
27. Car mileage—balance	44,617 66	162,721 87	207,339 53
28. Loss and damage	40,044 61	147,025 54	187,070 15
29. Injuries to persons	24,119 54	48,974 59	73,094 13
30. Barges, floats, tugs, ferry-boats, expenses of, including wages, fuel, and supplies	10,432 28	54,666 93	65,099 21
31. Other expenses	72,267 89	130,064 17	202,332 06
Total	786,795 42	2,351,089 11	3,137,884 53

396 (44) *Instructions for Answering Questions on Opposite Page.*

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See "instructions," page 42.

Explanatory Remarks.

396 (45) *Operating Expenses*—Continued.

(Apportionment between passenger and freight traffic is estimated according to the rule prescribed by the Interstate Commerce Commission.)

Item.	Chargeable to passenger traffic.	Chargeable to freight traffic.	Total.
General expenses:			
32. Salaries of officers	9,655 93	28,967 79	38,623 72
33. Salaries of clerks	6,940 33	20,820 97	27,761 30
34. General office expenses and supplies	2,436 25	7,308 76	9,745 01
35. Agencies, including salaries and rent	36,605 31	84,923 37	120,528 68
36. Advertising	11,924 12	2 10	11,926 22
37. Commissions			
38. Insurance	8,269 27	24,807 79	33,077 06
39. Expense of fast-freight lines			
40. Expense of traffic associations			
41. Expense of stock yards and elevators			
42. Rents for tracks, yards, and terminals—page 47 B	13,851 00	41,553 00	55,404 00
43. Rents not otherwise provided for			
44. Legal expenses	13,098 10	39,294 30	52,392 40
45. Stationery and printing	9,661 28	19,833 26	29,494 54
46. Other general expenses	11,474 69	34,424 05	45,898 74
Total	123,916 28	300,935 39	424,851 67
Recapitulation of expenses:			
47. Maintenance of way and structures	363,010 03	1,082,704 85	1,445,714 88
48. Maintenance of equipment	198,283 02	566,772 91	765,055 93
49. Conducting transportation	786,795 42	2,351,089 11	3,137,884 53
50. General expenses	123,916 28	300,935 39	424,851 67
Grand total	1,472,004 75	4,301,502 26	5,773,507 01
Percentage of expenses to earnings—entire line			81.19
Operating expenses—State of Texas—"estimated:"			
Maintenance of way and structures	224,748 71	695,834 48	920,583 19
Maintenance of equipment	133,802 04	361,761 08	495,563 12
Conducting transportation	583,893 50	1,799,345 28	2,383,238 78
General expenses	91,753 15	224,637 05	316,390 20
Total	1,034,197 40	3,081,577 89	4,115,775 29
Percentage of expenses to earnings—Texas			85.81

396 (46) *Instructions for Answering Questions on Opposite Page.*

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Table "A."

State the amount of rents paid for leased roads and designate whether payment is made by payment of interest on guaranteed bonds, by payment of dividends on guaranteed stocks or by cash payment. Carry the total to the "income account," page 31 (or 33), as deduction from income, charged to "rents."

Table "B."

State the amount of rents paid for lease of other property as called for in the table. Carry the total to "operating expenses," page 45.

Payments for lease of cars or equipment should not be entered on opposite page as "rents paid for lease of other property," but should be returned as prescribed on page 21 of this form.

Explanatory Remarks.

396 (47) RENTALS PAID.

A.—*Rents Paid for Lease of Road.*

Name of road.	Interest on bonds guaranteed.	Dividends on stock guaranteed.	Cash.	Total.
Vicksburg, Shreveport and Pacific	None	None	13,500	13,500
Total rents—A	None	None	13,500	13,500

For entry on page 31 (or 33).

B.—*Rents Paid for Lease of Other Property.*

Designation of property.	Situation of property leased.	Name of company owning property leased.	Item.	Total.
Tracks:	Sierra Blanca to El Paso	Southern Pacific Co.	55,404	
Total				55,404
Yards:	None		None.	
Total				
Terminals:	None		None.	
Total				
	Grand total rents—B			55,404

(For entry on page 45, item 42.)

396 (48) *Instructions for Answering Questions on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "none" may be used for a whole page; or under any column heading; or against any particular item or items, where that word expresses the facts. In other cases, refer by note to this page, as for example, "see page 48," where a brief explanation should be given why specific data called for cannot be returned exactly as requested.

It is the object of pages 49 and 51, by means of a "comparative general balance-sheet," to show the financial changes that have taken place in the financial condition of the road during the year covered by the report. On the left of each page, in first two columns, the balance-sheet as it stood on June 30, 1891, should be given. In the two columns on the right, next following the printed items called for, the balance-sheet as it stood on June 30, 1892, should be given. In the last two columns on the right, should be shown the difference between the items named as returned for the two dates respectively, entered in the proper column, according as that difference shows an "increase" or a "decrease" in the account specified.

"Cash and current assets," page 49, and "current liabilities," page 51, should each be given as a total and not as a balance, corresponding to data returned in the lower table on page 23.

If there is a separate "profit and loss" account for the property returned on page 11, the net result of the year's operations may be entered as a separate item.

In case items entered in columns headed "increase" or "decrease" are due to consolidation or reorganization and the issue of new stocks or new bonds, or to any important financial operation during the year covered by this report, full explanation of the same should be made on page 53 of this form.

Explanatory Remarks.

396 (49) *Comparative General Balance-sheet.*

June 30, 1891. Item.	June 30, 1891. Total.	Assets.	June 30, 1892. Item.	June 30, 1892. Total.	Year ending June 30, 1892. Increase.	Year ending June 30, 1892. Decrease.
	80,473,006 86	Cost of road—page 29 / Cost of equipment—page 29		80,523,840 94	50,834 08	
	6,735,520 57	Stocks owned—page 37		6,735,929 82	409 25	
	1,803,494 00	Bonds owned—page 39		1,803,594 00		
		Other permanent investments				
	136,276 46	Gordon coal mines		136,577 20	300 74	
		Lands owned				
	790,026 64	Cash and current assets—page 23		905,319 12	115,292 48	
		Other assets:				
	260,019 27	Materials and supplies		287,122 09	27,152 82	
		Sinking fund				
	4,178,083 79	Sundries		4,052,479 50		125,604 29
	90,676 38	Profit and loss—page 31 (or 33)		523,807 61	433,131 23	
	94,467,103 97	Grand total		94,968,620 28	501,516 31	

396 (50) *Instructions for Answering Questions on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "none" may be used for a whole page; or under any column heading; or against any particular item or items, where that word expresses the facts. In other cases, refer by note to this page, as for example, "see page 50," where a brief explanation should be given why specific data called for cannot be returned exactly as requested.

See "instructions," page 48.

In case items entered in columns headed "increase" or "decrease" are due to consolidation or reorganization and the issue of new stocks or new bonds, or to any important financial operation during the year covered by this report, full explanation of the same should be made on page 53 of this form.

Explanatory Remarks.

396 (51) *Comparative General Balance-sheet.*

June 30, 1891.		Liabilities.	June 30, 1892.		Year ending June 30, 1892.	
Item.	Total.		Item.	Total.	Increase.	Decrease.
	38,710,900	Capital stock—page 17		38,710,900		
	54,324,186 06	Funded debt—page 23		54,390,050 32	65,864 26	
	1,187,222 11	Current liabilities—page 23		1,622,684 53	435,462 42	
	163,384 17	Accrued interest on funded debt not yet payable.		163,384 17		
	81,411 63	Estimated taxes		81,601 26	189 63	
		Profit and loss—page 31 (or 33)				
	94,467,103 97	Grand total		94,968,620 28	501,516 31	

396 (58) *Instructions for Answering Questions on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "none" may be used for a whole page; or under any column heading; or against any particular item or items, where that word expresses the facts. In other cases, refer by note to this page, as for example, "see page 58," where a brief explanation should be given why specific data called for cannot be returned exactly as requested.

In this table, state the specific "number" of each class of employees as determined from the pay-rolls on June 30, 1892; the "total number of days worked," and the "total yearly compensation" should be given for each class of employees named. There should also be given the "average daily compensation" for employees in each class computed according to the following rule: First, ascertain the entire number of days worked by the employees of any class named during the year covered by this report, to be entered under "total number of days worked;" second, ascertain the total compensation paid to the employees of the class during said year, to be entered under "total yearly compensation;" third, divide the "total yearly compensation" by the "total number of days worked," and the quotient will be the "average daily compensation" for working days of the employees in the class named.

Under "distribution of above," data should be given only against the four subheadings printed, and in making the distribution called for, if nothing is to be returned opposite any one or more of these subheadings, the same should be explained briefly, especially when figures are returned on pages 43 and 45 under the four corresponding subheadings of "operating expenses." The four items against each "total" in the lower part of the table should agree exactly with similar entries opposite corresponding "total" above; the same remark applies to data returned against "less 'general officers.'"

Explanatory Remarks.

396 (59) *Employees and Salaries—State of Texas.*

Class.	Number.	Total number of days worked.	Total yearly compensation.	Average daily compensation.
General officers	42	13,146	92,670 20	7 05
General office clerks	159	49,767	112,540 05	2 26
Station agents	102	31,926	97,640 15	3 06
Other stationmen	220	68,860	135,161 10	1 96
Enginemen	175	54,775	203,916 70	3 72
Firemen	177	55,401	117,901 75	2 13
Conductors	96	30,048	117,309 86	3 90
Other trainmen	221	69,173	162,917 95	2 35
Machinists	152	47,576	145,211 09	3 05
Carpenters	301	94,213	211,819 21	2 25
Other shopmen	130	40,690	131,119 20	3 22
Section foremen	159	49,767	105,462 80	2 12
Other trackmen	726	227,238	264,994 45	1 17
Switchmen, flagmen, and watchmen	102	31,926	86,514 90	2 71
Telegraph operators and dispatchers	153	47,889	119,420 70	2 49
Employees—account floating equipment				
All other employees and laborers	447	139,911	187,999 15	1 34
Total (including "general officers")—Texas	3,362	1,052,306	2,292,597 26	2 18
Less "general officers"	42	13,146	92,670 20	7 05
Total (excluding "general officers")—Texas	3,320	1,039,160	2,199,927 06	2 12
Distribution of above:				
General administration	201	62,913	205,210 25	3 26
Maintenance of way and structures	1,159	362,767	521,873 10	1 44
Maintenance of equipment	741	231,933	512,982 60	2 21
Conducting transportation	1,261	394,693	1,052,531 31	2 67
Total (including "general officers")—Texas	3,362	1,052,306	2,292,597 26	2 18
Less "general officers"	42	13,146	92,670 20	7 05
Total (excluding "general officers")—Texas	3,320	1,039,160	2,199,927 06	2 12
Total (including "general officers")—entire line	4,479	1,401,927	3,055,211 64	2 18

396 .(60) *Instructions for Answering Questions on Opposite Page.*

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The division of "operating expenses" between passenger and freight traffic, as per pages 43 and 45, together with the ton and passenger mileage, give the bases for arriving at the "estimated cost of carrying each passenger one mile," and "estimated cost of carrying one ton one mile." In computing these items, as well as the "average amount received from each passenger," "average receipts per passenger per mile," "passenger earnings per train mile," and the corresponding items called for under "freight traffic," the amounts should be carefully figured to five places beyond the decimal point, entries of results being made under the proper heading of "dollars," "cents," and "mills."

Make sure that against "total passenger revenue," "total passenger earnings," and similar items under "freight traffic," are entered the respective amounts returned on page 35 opposite said items; also, in the computation of "passenger earnings per mile of road," "passenger earnings per train mile," and the corresponding items under "freight traffic," that "total passenger earnings" and "total freight earnings," respectively, are used. In figuring "passenger earnings per mile of road," "freight earnings per mile of road," and the four "per mile of road" items under "passenger and freight," the "total mileage operated" (single track) should in each case be used as returned on page 69 under table "A." In computing "passenger earnings per train mile," add 25 per cent. of "miles run by mixed trains" to the number of "miles run by passenger trains," to obtain the proper divisor; for "freight earnings per train mile," add 75 per cent. of "miles run by mixed trains" to the number of "miles run by freight trains."

"Miles run by switching trains" may be given according to the method heretofore in use, or such other method as shall be considered most accurate. State upon this page (60) the process pursued in ascertaining mileage of switching trains.

Explanatory Remarks.

396 (61) *Passenger and Freight and Train Mileage—State of Texas.*

Item.	Column for tonnage, number passengers, number trains, mileage, number cars.	Columns for revenue and rates. Dollars.	Cts.	Mills.
Passenger traffic:				
Number of passengers carried earning revenue	942,080			
Number of passengers carried one mile	55,316,118			
Average distance carried	58.3			
Total passenger revenue—page 35		1,434,052	26	
Average amount received from each passenger		1	54	34
Average receipts per passenger per mile			02	63
Estimated cost of carrying each passenger one mile			01	87
Total passenger earnings—page 35		1,739,263	33	
Passenger earnings per mile of road		1,535	18	39
Passenger earnings per train mile		1	16	35
Freight traffic:				
Number of tons carried of freight earning revenue	956,937			
Number of tons carried one mile	262,085,880			
Average distance haul of one ton	273.9			
Total freight revenue—page 35		2,980,796	95	
Average amount received for each ton of freight		3	11	49
Average receipts per ton per mile			01	14
Estimated cost of carrying one ton one mile			01	18
Total freight earnings—page 35		3,014,990	88	
Freight earnings per mile of road		2,660	27	35
Freight earnings per train mile		1	28	63
Passenger and freight:				
Passenger and freight revenue—page 35		4,434,849	21	
Passenger and freight revenue per mile of road		3,914	25	35
Passenger and freight earnings—page 35		4,753,354	21	
Passenger and freight earnings per mile of road		4,195	37	
Gross earnings from operation—page 35		4,796,557	16	
Gross earnings from operation per mile of road		4,233	50	14
Expenses—page 45		4,115,775	29	
Expenses per mile of road		3,632	63	49
Train mileage:				
Miles runs by passenger trains	1,494,897			
Miles run by freight trains	2,343,188			
Miles run by mixed trains	None.			
Total mileage trains earning revenue	3,838,085			
Miles run by switching trains	712,466			
Miles run by construction and other trains	92,034			
Grand total train mileage	4,642,585			
Mileage of loaded freight cars—north or east	11,632,961			
Mileage of loaded freight cars—south or west	17,080,613			
Mileage of empty freight cars—north or east	8,850,217			
Mileage of empty freight cars—south or west	3,297,949			
Average number of freight cars in train	17.43			
Average number of loaded cars in train	12.25			
Average number of empty cars in train	5.18			
Average number of tons of freight in train	111.85			
Average number of tons of freight in each loaded car	9.13			

396 (62) *Instructions for Answering Questions on Opposite Page.*

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See "instructions," page 60, observing that references to "page 35" in the second paragraph do not apply to filling out page 63, unless data returned on page 35 of the Annual Report to the Interstate Commerce Commission is used.

Explanatory Remarks.

396 (63) *Passenger and Freight and Train Mileage—Entire Line.*

Item.	Column for tonnage, number passengers, number trains, mileage, number cars.	Columns for revenue and rates. Dollars.	Cts.	Mills.
Passenger traffic:				
Number of passengers carried earning revenue	1,217,426			
Number of passengers carried one mile	71,876,994			
Average distance carried	58.9			
Total passenger revenue		1,876,334	67	
Average amount received from each passenger		1	54	12
Average receipts per passenger per mile			02	610
Estimated cost of carrying each passenger one mile			02	048
Total passenger earnings		2,265,747	57	
Passenger earnings per mile of road		1,511	50	6
Passenger earnings per train mile		1	20	97
Freight traffic:				
Number of tons carried of freight earning revenue	1,545,328			
Number of tons carried one mile	387,278,740			
Average distance haul of one ton	250.6			
Total freight revenue		4,748,706	83	
Average amount received for each ton of freight		3	07	25
Average receipts per ton per mile			01	226
Estimated cost of carrying one ton one mile			01	111
Total freight earnings		4,791,381	79	
Freight earnings per mile of road		3,196	38	6
Freight earnings per train mile		1	62	71
Passenger and freight:				
Passenger and freight revenue		6,624,411	50	
Passenger and freight revenue per mile of road		4,419	22	05
Passenger and freight earnings		7,057,129	36	
Passenger and freight earnings per mile of road		4,707	89	2
Gross earnings from operation		7,110,999	91	
Gross earnings from operation per mile of road		4,743	82	92
Expenses		5,773,567	01	
Expenses per mile of road		3,851	57	24
Train mileage:				
Miles run by passenger trains	1,872,989			
Miles run by freight trains	2,955,625			
Miles run by mixed trains	None.			
Total mileage trains earning revenue	4,828,614			
Miles run by switching trains	948,526			
Miles run by construction and other trains	145,976			
Grand total train mileage	5,923,116			
Mileage of loaded freight cars—north or east	18,566,182			
Mileage of loaded freight cars—south or west	23,717,427			
Mileage of empty freight cars—north or east	10,654,084			
Mileage of empty freight cars—south or west	5,264,623			
Average number of freight cars in train	19.6			
Average number of loaded cars in train	14.3			
Average number of empty cars in train	5.3			
Average number of tons of freight in train	131.03			
Average number of tons of freight in each loaded car	9.17			

396 (64) *Instructions for Answering Questions on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "none" may be used for a whole page; or under any column heading; or against any particular item or items, where that word expresses the facts. In other cases, refer by note to this page, as for example, "see page 64," where a brief explanation should be given why specific data called for cannot be returned exactly as requested.

This page calls for a statement of the total tonnage carried by each road of the various commodities mentioned, company's material excluded. It will be observed that the table calls for the names of any important commodities which are carried by the roads and which are not specifically provided for in the form. The object of the second column ("freight originating on this road") is to enable the commission to obtain the total movement throughout the country of the commodities named. Each carrier should report in this column the tonnage of all traffic which originates at any and every point on its line. All traffic which is received from rail or water connections directly, whether through elevators or other methods of transfer, and the initial movement of which has been on the line of other carriers, should be given in the next column. Each carrier supplying the data called for by this table should adopt such methods as will prevent the same traffic being reported as originating on more than one line. The second column is intended to show only the initial movement of the traffic.

The percentage should be computed to show what proportion the total tonnage of each commodity bears to the total tonnage of all commodities carried.

Explanatory Remarks.

396 (65) *Freight Traffic Movement—State of Texas.*

(Company's material excluded.)

Commodity.		Freight originating on this road.	Freight received from connecting roads and other carriers.	Total freight tonnage.	
		Whole tons.	Whole tons.	Whole tons.	Per cent.
Products of agriculture.	Grain	56,728	25,141	81,869	.0856
	Flour	16,097	19,732	35,829	.0375
	Other mill products				
	Hay				
	Tobacco				
	Cotton	93,736	11,505	105,241	.11
	Fruit and vegetables	85,478	22,726	108,204	.1132
	Other articles				
Products of animals.	Live stock	85,587	21,612	107,199	.1121
	Dressed meats				
	Other packing-house products				
	Poultry, game, and fish	4,762	957	5,719	.0052
	Wool				
	Hides and leather				
	Other articles				
Products of mines.	Anthracite coal	16,227	53,714	69,941	.0732
	Bituminous coal				
	Coke				
	Ores				
	Stone, sand, and other like articles				
Products of forest.	Lumber	162,513	18,674	181,187	.1894
	Other articles	19,723	21,064	40,787	.0427
Manufactures.	Petroleum and other oils				
	Sugar				
	Naval stores				
	Iron—pig and bloom				
	Iron and steel rails				
	Other castings and machinery				
	Bar and sheet metal				
	Cement, brick, and lime				
	Agricultural implements				
	Wagons, carriages, tools, etc.				
	Wines, liquors, and beers				
	Household goods and furniture				
	Salt	7,626	937	8,563	.0090
Merchandise and manufactures		47,216	87,762	134,978	.1412
Miscellaneous—Other commodities not mentioned above		56,728	20,692	77,420	.0809
Total tonnage—Texas		652,421	304,516	956,937	1.0000
Total tonnage—entire line		1,137,974	407,354	1,545,328	100

396 (70) *Instructions for Answering Questions on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "none" may be used for a whole page; or a distinct table; or under any column heading; or against any particular item or items, where that word expresses the facts. In other cases, refer by note to this page, as for example, "see page 70," where a brief explanation should be given why specific data called for cannot be returned exactly as requested.

Under "consumption of fuel by locomotives," the ton of two thousand pounds should be used in reporting coal. In stating the total tonnage of fuel consumed, the tonnage of wood is to be estimated as follows: Hard wood, one and one-half cords to be equivalent to one ton of coal; soft wood, two cords to be equivalent to one ton of coal. In stating "average cost at distributing point," different points may be named if desired, giving the cost at each.

Explanatory Remarks.

New rails laid during year.				New ties laid during year.		
Kind.	Tons.	Weight per yard.	Average price per ton at distributing point.	Kind.	Number.	Average price at distributing point.
Iron	None	None	None	Oak	251,356	27½c.
Total iron				Pine	165,034	27½c.
Steel	3,114¾	63 lbs.	$31 74	Total	416,390	27½c.
Total steel	3,114¾	63 lbs.	$31 74			

Consumption of Fuel by Locomotives—State of Texas.

Locomotives.	Coal—tons.		Wood—cords.		Total fuel consumed—tons.	Miles run.	Average pounds consumed per mile.
	Anthracite.	Bituminous.	Hard.	Soft.			
Passenger	None	43,533.80	1,301.70		44,401.50	1,508,989	58.85
Freight		144,278.05	3,972.70		146,926.50	2,380,410	123.45
Switching		15,220.30			15,220.30	712,784	42.72
Construction		3,433.15			3,433.15	136,568	50.28
Total		206,465.30	5,274.40		209,981.45	4,738,451	88.63
Average cost at distributing point		$2.64	$2.30				

Endorsed on cover: Case No. 15,551. W. Texas C. C. U. S. Term No., 1167. John H. Reagan, W. P. McLean, L. L. Foster, and C. A. Culberson, appellants, *vs.* The Mercantile Trust Company, trustee, and The Texas & Pacific Railway Company. Filed March 31st, 1894.

Office Supreme Court U. S.
FILED.
APR 13 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. 1167.

JOHN H. REAGAN ET AL., APPELLANTS,

vs.

THE MERCANTILE TRUST COMPANY AND THE TEXAS AND PACIFIC RAILWAY COMPANY,

APPELLEES.

APPEAL FROM THE CIRCUIT COURT FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

C. A. CULBERSON,
H. C. COKE,
W. S. SIMKINS,
For Appellants.

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IN THE

Supreme Court of the United States.

No. 1167.

JOHN H. REAGAN ET AL., APPELLANTS,

vs.

THE MERCANTILE TRUST COMPANY AND THE TEXAS AND PACIFIC RAILWAY COMPANY,

APPELLEES.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

With the exception of the differences hereafter noted, the facts in this case are substantially the same as those in No. 928, *John H. Reagan et al.* vs. *Farmers' Loan and Trust Company et al.*, and we assume that it is unnecessary to restate them here. The differences referred to are as follows:

(1.) It is alleged in the original and cross bills that inasmuch as the Texas and Pacific Railway Company was chartered by an act of Congress, the act of the legislature of Texas approved April 3, 1891, authorizing the commission to establish rates is not applicable to that company, it being insisted that the rates which that company may charge are governed by its charter.

(2.) It is also alleged in the original and cross bills that the legislature of Texas passed an act, which became a law May 2, 1873, entitled "An act to define and adjust the rights of the Texas and Pacific Railway Company within the State of Texas, in order to encourage the speedy construction of a railway to the Pacific ocean;" that said act donated to the company twenty sections of land of 640 acres each to the mile of completed road; that it is provided in said act that the directors of the company should within 15 days signify their acceptance of the act to the governor, which was done; and that the act contains this provision: "The said Texas and Pacific Railway Company shall be subject to such general laws as may be enacted by the legislature applicable to other railroads constructed within this State."

Notwithstanding these allegations it is averred that the law thus enacted and the contract thus entered into were unauthorized by reason of its Federal charter, and are not binding upon the company.

(3.) Upon the subject of the injurious effects of the rates fixed by the commission it is alleged in the original bill that such rates are unreasonable, and if enforced will reduce the revenues of the company $150,000 per annum; that during the year 1890 the company earned a net income of $1,467,000.05, which was inadequate to pay operating expenses and fixed charges, and a statement is appended to show that the transportation receipts for the year 1890 were $319,000 less than for the year 1889.

It is alleged in the amended bills that by the tariffs 1 to 10, established by the commission, a reduction of $252,102.72 has occurred to July 1, 1892, and that upon all the tariffs fixed the loss will amount to $400,000 per year.

Only such questions will be presented in this brief as are not discussed in the brief and printed arguments in the case of the *International and Great Northern Railroad Company.*

I.

We do not believe that the question of the application of the commission law to the Texas and Pacific Railway Company is involved in this appeal. On the trial below appellants interposed numerous demurrers and exceptions both to the original and cross bills. Among those to the original bill is No. 13, to wit: "That so much of the allegations of complainants' bill as seek to avoid the power of the State to prescribe laws for the Texas and Pacific Railway Company because of having been chartered by the Congress of the United States is insufficient in this, that the commission law complained of provides that it shall apply to and affect only transportation of passengers, freight, and cars between points within the State of Texas." To the amended bill of complaint it was excepted, No. 17: "That the second paragraph of the amended bill of complaint, in which it is sought to exempt the defendant company from the operation of the laws of Texas, is insufficient in law because the commission act is expressly confined to the regulation of purely interstate freight and because the allegations of said amendment show that the defendant has lawfully contracted with the State of Texas to be governed by its laws, and because the defendant company may not in equity repudiate the said contract without restitution of the property received thereunder." The demurrers to the cross-bill adopt those to the original bill, from 2 to 16, and add (No. 4):

"That the amended cross-complaint, which seeks to exempt the defendant company from the operation of the laws of Texas, is insufficient in law, because the commission act is expressly confined to freight having origin and destination in this State, and because the allegations of said amendment show that the defendant company lawfully contracted with the State of Texas to be bound by its laws, and because said

company may not in equity repudiate said contract without restitution of the property received thereunder." These demurrers were sustained by the court, as will be seen by the following extract from the final decree, to wit: "The court, considering the law is in favor of complainant and cross-complainant, except as to the 13th and 17th grounds of demurrer to the original bill as amended, and as to the 13th ground of demurrer to the original bill adopted as a ground of demurrer to the cross-bill as amended, and as to the 4th ground of demurrer to the cross-bill as amended, it is ordered, adjudged, and decreed that said demurrers be, and the same are hereby, overruled, except said demurrers above named, which are sustained." From this decree against them appellees have not prosecuted an appeal and consequently they cannot be heard on the question.

Chittenden *vs.* Brewster, 2 Wall., 191.
Martin *vs.* Transportation Co., 12 Wall., 31.
Coggeshall *vs.* United States, 2 Wall., 383.
Morgan *vs.* Good, 94 U. S., 599.
Clark *vs.* Killian, 103 U. S., 766.
London *vs.* Taxing District, 104 U. S., 771.
Gage *vs.* Pumpelly, 115 U. S., 454.

II.

But if the question shall be considered we submit that because this company was chartered by Congress it is not exempt from the operation of the laws of Texas applicable to purely internal commerce.

Congress is not given express authority to create corporations. The authority to do so rests upon the implied power to perform all acts necessary to carry out the powers expressly delegated. For instance, railway and telegraph companies may be formed under the authority to regulate interstate commerce and to lay out military and post roads,

and banks may be created to carry on the fiscal operations of the Government.

1 Beach Railways, sect. 24.
McCullough *vs.* Maryland, 4 Wheat., 316.
Osburne *vs.* Bank, 9 Wheat., 738.
Thompson *vs.* R. R. Co., 9 Wall., 579.
Bank *vs.* Dearing, 91 U. S., 29.

The only delegated power under which it can be said this company was chartered is the authority of Congress to regulate interstate commerce or lay out military and post roads. The charter clearly shows, however, when carefully examined, that the main purpose was interstate commerce, to connect the Atlantic and Pacific States, and that the matters of military and post road were only incidental and secondary. If, therefore, this company was organized in aid of interstate traffic this fact does not exempt it from the operation of State laws as to local or purely internal traffic. Congress is without authority to regulate internal commerce, and consequently it may not withdraw such regulation from the States by the incorporation of companies, and no such purpose is disclosed by the charter of this company. On the contrary, a careful examination of its provisions fails to discover any intention on the part of Congress to interfere with this important reserved right of the States.

The rule is clear and undisputed that *all* commerce is subject to regulation—foreign and interstate commerce by Congress, and intrastate commerce by the States (Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 215; Ratterman *vs.* R. R. Co., 127 U. S., 411). If the doctrine contended for by the company in this case be approved, then the local traffic of the company may not be regulated by *any* authority—not by Congress, because of its limitation to foreign and interstate commerce, nor by the States, because of its Federal charter. The commission law of Texas is expressly

confined to the regulation of traffic having origin and destination within the State, and thus the constitutional powers of the General and State governments are preserved and harmonized.

With reference to the question of the railway being a military or post road, it is sufficient to say that until the General Government complains it is unnecessary to consider it.

Peik *vs.* R. R. Co., 94 U. S., 177.
R. R. Co. *vs.* Gill, 15 S. W. Rep. (Ark.), 19.

Independently of these principles this company, as shown by the amended bills, is subject to the general railway laws of Texas by reason of its contract with the State to that effect, supported by a valuable consideration. The authority to enter into such a contract is given by section 4 of the charter and was ratified by Congress by the act of June 22, 1874.

16 U. S. Stats. at Large, 575, sect. 4.
18 U. S. Stats. at Large, 197, 198.
Special Laws Texas, 1873, p. 325, sect. 9.
Peik *vs.* R. R. Co., 94 U. S., 176, 177.

Federal corporations are subject to State laws of taxation and regulation not affecting interstate commerce.

Ficklen *vs.* Shelby Co., 145 U. S., 24.
R. R. Co. *vs.* Pennsylvania, 145 U. S., 192.
R. R. Co. *vs.* Pennington, 18 Wall., 5.
Thompson *vs.* R. R. Co., 9 Wall., 579.
Tel. Co. *vs.* Massachusetts, 125 U. S., 530.

III.

During the argument in the *International* case Mr. Justice Harlan inquired whether, in view of section 14 of the commission law, the rates were not to be deemed conclusively

reasonable in suits instituted in the name of the State as well as those brought by private parties.

Unquestionably this inquiry must be answered in the negative. This would follow from a just interpretation of the act, as was stated by counsel at the time in answer, the maxim *expressio unius*, &c., undoubtedly applying.

But we are not left to construction. Section 14 imposes the penalties payable to the State for a violation of the act. The method of recovery is prescribed by section 19, in which it is expressly declared that "in all suits arising under this act the rules of evidence shall be the same as in ordinary civil actions, except as otherwise herein provided." It is not otherwise provided except in section 5.

This is admitted to be the proper construction by counsel for the railway company (brief, 39 *et seq.*) and by counsel for the trustee (brief, 189).

IV.

In addition to what we have said as to the act of February 7, 1853, in the *International* case it is submitted:

(1.) That the act in the very nature of things applied only to railway corporations organized under the laws of Texas.

(2.) Whatever rights and privileges were granted this company by the State of Texas, with the conditions imposed, are contained in the act of May 2, 1873, made part of the amended bill. By the ninth section of this act it is expressly declared "that the said Texas and Pacific Railway Company shall be subject to such general laws as may be enacted by the legislature applicable to other railroads constructed within this State." It is not competent for the State to reserve the right to amend or alter the charter of this company, yet, in so far as its authority over the company may lawfully extend, this section is an explicit decla-

ration that it was not surrendered. Within this authority is unquestionably included the power to regulate intrastate rates, and it is not limited as in the act of 1853.

V.

The reports of the railway company for the years ending June 30, 1891, and June 30, 1892, made parts of the bills, show that the rates established by the commission are reasonable and just.

As the transcript of the record has not yet been printed and is now in the hands of the printer, we will be unable to refer to it by pages, but the references will be to the three columns—"Cost of road, equipment, and permanent improvements," "Income account," and "Operating expenses."

The report for the year 1891, as will appear from the income account, shows a net income, after payment of operating expenses, interest on the bonded debt, and taxes, of $23,681.29, notwithstanding there was charged to "operating expenses" $297,216.95 for fences, grading and bridge and culvert masonry, bridges and trestles, rails, buildings, furniture and fixtures, sidings and yard extensions, and other items which are not operating expenses proper, but part of the "cost of road, equipment, and permanent improvements." In addition to this there was deducted from income for "permanent improvements" $366,655.01.

The report for 1892 purports to show a deficit of $433,131.23. This is done by including in operating expenses money spent for real estate, fences, grading and bridge and culvert masonry, bridges and trestles, other superstructures, rails, buildings, furniture and fixtures, shop machinery and tools, wharfing, sidings and yard extensions, terminal facilities, other deductions, locomotives, freight cars, other cars, and floating equipment, amounting to $379,524.85, and, in addition, deducting from income the sum of $310,074.39 for

"permanent improvements." The true state of the account thus corrected is this:

Gross earnings		$7,110,999 91
Less operating expenses		5,773,507 01
Income from operation		$1,337,492 90
Other income		58,677 89
Total income		$1,396,170 79
To which should be added amounts expended for "cost of road, equipment, and permanent improvements," included in operating expenses		379,524 85
Total income		$1,775,695 64
Deductions from income:		
Interest on bonded debt	$1,279,490 00	
Interest on current debt	11,084 21	
Rents	13,500 00	
Taxes	187,585 04	
Other deductions	27,568 38	
Total deductions		$1,519,227 63
Surplus after paying operating expenses proper, accrued interest, taxes, &c.		$256,468 01

To put this statement in the language of Mr. Justice Brewer, the gross earnings of the company, amounting to $7,110,999.91, were sufficient to pay the operating expenses proper, $5,393,982.16 ($5,773,507.01 less $379,524.85, put into "cost of road, equipment, and permanent improvements"); fixed charges, taxes, &c., amounting to $1,519,227.63 ($1,829,302.02 less $310,074.39, put into "permanent improvements"), and leave a surplus of $197,790.12. If to this be added $58,677.89 (income derived from other sources than the carriage of passengers and freight), we have $256,468.01, the surplus shown in the corrected statement of the

account. That this sum was placed in betterments instead of being applied to interest and dividend on stock cannot affect the question.

It is submitted that the cause should be reversed with directions to dismiss the bills.

C. A. Culbertson,
H. C. Coke,
W. S. Simkins,
For Appellants.

Office Supreme Court U. S.
FILED.
APR 13 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.—No. 1167.

JOHN H. REAGAN ET AL.,
Appellants,

vs.

THE MERCANTILE TRUST COMPANY AND THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellees.

BRIEFS ON BEHALF OF THE TRUST COMPANY AND OF THE RAILWAY COMPANY, APPELLEES.

JOHN F. DILLON,
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C. G. Burgoyne, cor. Walker and Centre Sts., N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1893—No. 1167.

JOHN H. REAGAN ET AL.,
Appellants,

AGAINST

THE MERCANTILE TRUST COMPANY and THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellees.

Statement and Brief.

The bill of complaint in this cause was filed in the United States Circuit Court for the Western District of Texas on the same day as the bill of complaint of The Mercantile Trust Company in suit No. 928. The proceedings in this cause were conducted *pari passu* with those in cause No. 928, and are such exact dupli-

NOTE—Under the order requiring this brief to be filed by April 13th it is necessary to file it before the record is printed. We have, therefore, been compelled to refer to the record otherwise than by page. We trust and believe that this will not be found to be a source of much inconvenience to the Court. The haste necessary in order to submit all of these cases within the short time to which we were by the Court necessarily restricted, is also our apology for all shortcomings in this brief and others filed in these causes.

cates of the proceedings in that cause that we dispense with any statement of the case, except as to those points wherein it differs entirely from any of the series of cases submitted at the same time with it. After making such statement, we shall give a synopsis of the cost, bonded debt, effect of commission tariffs, and other facts peculiar to this case.

In addition to allegations similar to those in the bill in cause No. 928, the bill in this case alleges the following facts, wherein this cause differs entirely from the others, to wit (see Record, Bill of Complaint, and amendment thereto), that the defendant The Texas and Pacific Railway Company is a corporation organized and existing under the laws of the United States, to wit: An Act of Congress, approved March 3d, 1871, and Acts of Congress supplemental thereto and amendatory thereof, by which said acts the defendant company was, among other things, empowered and authorized to lay out, construct, furnish, maintain and enjoy a continuous line of railroad and telegraph line, with the appurtenances, from a point at or near Marshall, in the County of Harrison, State of Texas; thence by the most direct and eligible route to be determined by said company near the 32d parallel of north latitude to a point at or near El Paso; thence, &c., to San Diego, in the State of California, pursuing in the locating thereof, as near as might be, the 32d parallel of north latitude. That, under and by virtue of the powers and authority by said Act and Acts of Congress conferred upon the said The Texas and Pacific Railway Company, the said railway company built, constructed and acquired, and, at all times material to this litigation owned and operated, a line of railway extending from a point on the State line between the States of Louisiana and

Texas westwardly to Marshall, and from Marshall by way of Dallas to Fort Worth in the State of Texas; and from Texarkana on the State line between Texas and Arkansas to its junction via Clarksville, Paris, Bonham, Sherman and Whitesboro', with the main line aforesaid at Fort Worth; and from Marshall through the Town of Jefferson to its junction at or near Texarkana with the said line from Texarkana to Fort Worth; and from Fort Worth aforesaid to a junction with the Southern Pacific Railway at Sierra Blanca, at which point it unites and connects with the Galveston, Harrisburg and San Antonio Railroad; all of said line and lines of Railway being situate within the State of Texas; and also a line of railroad formerly known as the New Orleans and Pacific Railway extending from Shreveport to the Town of Goldsboro, opposite the City of New Orleans, and including a branch to Baton Rouge, all in the State of Louisiana, being about 336 miles in said last-mentioned State. And said railway company acquired, and at all said times has enjoyed, the right of joint use of the road of the Galveston, Harrisburg and San Antonio Rrailroad Company between Sierra Blanca aforesaid and El Paso, a distance of about 94 miles in the State of Texas, and also the right of way and a partially constructed line of railroad from Sierra Blanca to El Paso in said last-mentioned State; and said railway company acquired, and has at all of said times owned and enjoyed, a leasehold interest in the line of railroad of the Vicksburg, Shreveport and Texas Railroad Company, extending from Shreveport, in the State of Louisiana, to a connection on the main line of the railroad of The Texas and Pacific Railway Company at the State line between Louisiana and Texas.

That the said company was chartered by Act of Congress of the United States, as aforesaid, for the purpose of building, acquiring and operating lines of interstate railway, as an agency and instrumentality of interstate commerce and business, and with power and lawful capacity to regulate its own business, including its rates and charges for transportation, in any manner not inconsistent with the laws of the United States and the provisions of its charter; and that the only condition and limitation upon the right and lawful authority of the said Railway Company to fix and regulate said charges for transportation upon its own lines of railway are that said Railway Company is, by its said charter, prohibited from charging greater rates per mile for carrying passengers and freight than the prices which might be fixed by Congress for carrying passengers and freight on the Union Pacific and Central Pacific Railroads.

That, therefore, it was not and is not competent for the Legislature of the State of Texas, either by direct legislation or through the acts of any agency or instrumentality by it created, to fix and prescribe schedules of rates and classifications, regulating the business of said Railway Company; and that said Commission was and is without power or lawful authority, and could not derive power or lawful authority from said Act of April 3, 1891, or from any act of the Legislature of the State of Texas, to fix or prescribe rates, charges or classifications for said Railway Company, or to regulate the same in the manner proposed and attempted in and by the schedules adopted and promulgated by said Commission, as hereinbefore set forth. That said Act of the Legislature of the State of Texas, in so far as it purports or is intended to affect the defendant

Railway Company in the respects above recited, is inoperative and void, and that likewise inoperative and void are any acts, schedules, orders or regulations of said Railroad Commission in so far as they purport or are intended in like manner to affect said railway company or its business; for said act, acts, schedules, orders and regulations would operate to deprive said railway company of rights conferred upon and vested in it by the Act of the Congress of the United States constituting its charter, and are, therefore, contrary to the Constitution and laws, and to said last-mentioned law, of the United States.

That in and by said Act of Congress of March 3, 1871, incorporating the defendant railway company, it is provided, among other things, as follows:

Section 19. That the Texas Pacific Railroad Company shall be, and it is hereby declared to be a military and post road, and for the purpose of insuring the carrying the mails, troops, munitions of war, supplies and stores of the United States; no act of the company nor any law of any State or Territory shall impede, delay or prevent the said company from performing its obligations to the United States in that regard.

That in the event of the adoption and enforcement of said unreasonably low rates prescribed by said Commission, said railway company will be unable to pay interest upon its said fixed mortgage indebtedness, and to keep and maintain its railroad and equipment in such condition and repair as to enable it to properly perform its said charter obligations and to maintain a due and proper standard of safety and efficiency in the operation of its said railroad and property.

That the mortgage bonds and stock made and issued by said railway company, were so made and issued lawfully and in pursuance of power and au-

thority conferred upon said railway company in and by said Act of Congress of the United States of March 3d, 1871, and Acts of Congress supplemental thereto and amendatory thereof, constituting the charter of the said defendant railway company; that it was not and is not competent or lawful for the Legislature of the State of Texas, directly or through any instrumentality or agency by it created, to fix and establish such rates, charges and regulations affecting and controlling the transportation and business of the said railway company as will so impair and reduce its revenues that it will be unable to earn the interest upon its said bonds so made and issued. And that such legislative action of the State of Texas is and would be invalid and void because violative of the rights of the said railway company, and of its bondholders, secured to and conferred upon it and them under and by said Acts of Congress of the United States.

That the appellants Reagan, McLean, Foster and Culberson contend that the Texas and Pacific Railway Company is bound by the act of April 3d, 1891, and all other general laws of the State of Texas, in reference to railroads constructed in said State, by virtue of an act passed by the Legislature of the State of Texas, May 2d, 1873, which subsequently became a law within the time prescribed by the Constitution, entitled "An Act to define and adjust the rights of the Texas and Pacific Railway Company with the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific Ocean," by which said act the State of Texas, among other things, agreed to grant and donate to said Texas and Pacific Railway Company twenty sections of land of 640 acres

each for every mile of its road completed in good substantial running order in the manner and upon the terms and to the points in said act provided. And in consideration of said grant and donation it was provided in said act, among other things, that : " The said Texas and Pacific Railway Company shall be subject to such general laws as may be enacted by the Legislature applicable to other railroads constructed within this State ;" and by Section 11 of said Act of May 2d, 1873, it was provided : " That said Texas and Pacific Railway Company, by their Board of Directors, shall within fifteen days from the date of the approval of this act signify to the Governor, by telegraph or otherwise, and acceptance or rejection of the terms of this act, and within thirty days from the date of the approval of this act shall file a formal acceptance or rejection of the same with the Secretary of State of the State of Texas."

That defendants contend that the company and its creditors are so bound by said acts, because, within the time prescribed by said act, the Board of Directors of said company accepted the terms and conditions of said act, according to its terms. Such claim or contention we allege to be untrue, and not well founded, for these reasons : That the charter of the Texas and Pacific Railway Company (Act of Congress, approved March 3d, 1871), provided among other things as follows :

" SEC. 4. That said Texas Pacific Railroad Company shall have power and lawful authority to purchase the stock, land grants, franchises and appurtenances of, and consolidate on such terms as may be agreed upon between the parties, with any railroad company or companies heretofore chartered by Congressional, State or Territorial authority on the route prescribed in the first section of this act ; but no such consolidation shall be with any competing through lines of railroads to the Pacific Ocean."

And Section 6 of said act provided:

"That the rights, lands, land grants, franchises and appurtenances and property of every description belonging to each of the consolidated or purchase railroad company or companies, as herein provided, shall vest in and become absolutely the property of the Texas Pacific Railroad Company."

That the Southern Pacific Railroad Company was incorporated by Act of the Texas Legislature, approved February 16th, 1852, and the Southern Transcontinental Railway Company was incorporated by an Act of the Texas Legislature, approved July 27th, 1870. By an Act of the Texas Legislature, approved May 24th, 1871, the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company were authorized to consolidate with the Texas Pacific Railroad Company, the provisions of this act in this respect being as follows:

"SEC. 11. All the rights, benefits and privileges, granted and intended to be secured by this act, to the Southern Pacific Railroad Co., and to the Southern Transcontinental Railway Co., shall pass to and vest in the Texas Pacific Railroad Co., a corporation created by and under the laws of the United States by an act of Congress, approved March 3d, A. D. 1871, whenever the said Southern Pacific Railroad Co., and the said Southern Transcontinental Railway Co., shall have been consolidated with the said Texas Pacific Railroad Co., and authority is hereby given the said Southern Pacific Railroad Co. and said Southern Transcontinental Railway Co. and the said Texas Pacific Railroad Co. to consolidate on such lawful terms and conditions as may be agreed upon between the said companies, and be ratified by a majority of the stockholders of each of the corporations so consolidating; provided that the Texas Pacific Railroad Co. shall take no benefits whatever under or by virtue of this act until the said company shall have fully performed all the conditions imposed by this act upon the Southern Pacific Railroad Co. and the Southern Transcontinental Railway Co."

That in pursuance of the power thus expressed, and of that power alone in so far as the State of Texas was concerned, the consolidation was effected.

That, at the time of the passage of the Act of May 2d, 1873, hereinbefore referred to, the consolidation had been actually effected, and nothing remained to be done. That said consolidation had been effected by merger of the Southern Pacific Railroad Co. and the Southern Transcontinental Railway Co. into the Texas and Pacific Railway Co., through delivery of deeds, whereby the said former companies sold and assigned unto the Texas and Pacific Railway Co. all of their property, franchises, contracts, rights, privileges, etc., said deeds of consolidation and merger each containing this provision:

"The object and purpose of this indenture being to consolidate the said corporations into one by the sale of the Southern Pacific Railroad Co. (in the one case, and the Southern Transcontinental in the other), and all its property, rights and franchises, into the said Texas Pacific Railroad Company, so that the two corporations thus consolidated in accordance with the laws under which they were created may become one by merging the said Southern Pacific Railroad Company (or the Southern Transcontinental) into the said Texas Pacific Railroad Company."

That all of the considerations upon which the consolidation was effected under the Laws of Congress, and of the State of Texas, were fixed and established by the said Act of the Legislature of the State of Texas of May 24th, 1871, and by said deeds of merger, and that neither the Act of the Legislature of the State of Texas, approved February 16th, 1852, incorporating the Southern Pacific Railroad Company, nor the Act of said Legislature, approved July 27th, 1870, incorporating the Southern Transcontinental Railway

Company, nor the Act of said Legislature, approved May 24th, 1871, authorizing the consolidation and merger of said companies with and into the Texas Pacific Railroad Company, hereinbefore referred to, imposed any such restrictions and limitations requiring the Texas and Pacific Railroad Company to subject itself to the laws of the State of Texas and relinquish its Federal franchises and obligations, as was sought to be imposed upon it by the aforesaid act of the Legislature of the State of Texas, approved May 2d, 1873. That the power to consolidate, both under Federal and State legislation, had been exercised and exhausted when the Act of May 2d, 1873, was adopted, and said consolidation, as above set forth, had been fully effected and completed. That the Act of May 2d, 1873, not only recited the consolidation but recognized it as an accomplished fact, and dealt with the rights of the Texas and Pacific Railroad Company only as the assignee of the donations of the State to the two Texas companies which had been merged into it. Said act recites the power of the Texas companies to consolidate with the Texas and Pacific Railway Company, describing the latter as a corporation created by an act of the Congress of the United States, and further recites:

"Whereas, it appears from documentary evidence on file in the office of the Secretary of State of the State of Texas, that such consolidation has been effected, and as a difference of opinion may arise as to the construction of the acts of the Legislature hereinbefore referred to, in regard to the amount of lands to which said Texas and Pacific Railway Company may be entitled under the said acts of incorporation and other laws of this State; and whereas, it is desirable that there should be a complete and final adjustment of the rights of said Texas and Pacific Railway Company as the assignee and successor of the said Southern Pacific Railroad Company and the said Southern Transcontinental Rail-

way Company under the laws of this State, and a definite understanding as to the obligations of the State, and to the further end that said company be encouraged to a speedy construction of said railway," etc.;

thus in express terms recognizing and ratifying said consolidation.

That by the aforesaid acts, creating and incorporating the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company, and by and act entitled "An Act to encourage a speedy construction of a railway through the State of Texas to the Pacific Ocean," passed May 24th, 1871, and by an act amendatory thereof, passed November 21st, 1871, the State of Texas granted to and conferred upon said companies, and the Texas and Pacific Railway Company, for the consideration and inducement in said act specified, the bonds of the State of Texas of the denomination of $1,000 each, payable to said companies or bearer, in 30 years from the date thereof, with interest at the rate of 8% per annum, payable semi-annually, to the amount of $6,000,000 in all, with the right reserved to the State of Texas to substitute for said bonds a grant of public lands to said company to the amount of 24 sections of land of 640 acres each for each mile of road built by the said company, all the rights and benefits granted by the State of Texas by virtue of these acts had become vested in the Texas and Pacific Railway Company, and all conditions and requirements thereof had been complied with by the Texas and Pacific Railway Company before the passage of May 2d, 1873, hereinbefore referred to, and by said Act of May 2d, 1873, the Texas and Pacific Railway Company not only

acquired no additional benefits or donations, but the donations, the title to which had actually vested in it under previous consolidation, were cut down and limited by eliminating the grant of bonds and reducing by four sections the alternative or substituted grant of lands. That at the date of the passage of said Act of May 2d, 1873, the Texas and Pacific Railway Company did not receive, nor has it at any time since received, the money or the lands in lieu of the money promised it by the State of Texas, except twenty sections of land of 640 acres each for 402 miles of road constructed, completed and equipped by it, according to the terms of said act; and although said company has since the passage of said Act of May 2d, 1873, constructed, completed and fully equipped, in accordance with the requirements and terms of said act, more than 650 miles of its railway, in addition to the 402 miles before mentioned, yet the Texas and Pacific Railway Company has not received the twenty sections of land of 640 acres each for every mile of road so constructed and completed, and the State of Texas has undertaken to repeal all laws under and by virtue of which said lands could be acquired, including the said Act of May 2d, 1873, and has, by general laws, withdrawn all its lands from location or appropriation by said railway company, out of which said donation or grant could have been satisfied, which general laws are here referred to. That the said Act of May 2d, 1873, had no part whatever in fixing the terms of the consolidation and merger of said Texas corporations with and into the Texas and Pacific Railway Company, and that said act has never received the sanction of Congress, either express or implied. That by an act approved June 22d, 1874, amending and supplementing the acts theretofore passed, creating

the Texas and Pacific Railway Company by the consolidation of the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company with and merger into the Texas and Pacific Railway Company, as accomplished under the aforesaid act of the State of Texas of May 24th, 1871, the Congress of the United States expressly recognized and limited such consolidation by the following provisions in said act:

"And such mortgages for the division east of Fort Worth shall embrace the roads and property of the Southern Pacific Railroad Company and of the Southern Transcontinental Railway Company, heretofore merged in and consolidated with said Texas and Pacific Railway Company under the authority and requirements of the laws of the State of Texas; and each road so merged as aforesaid shall for that and all other purposes be deemed and taken to be a part of said Texas and Pacific Railway, and shall hereafter be subject to all the provisions and limitations of the Act of Congress incorporating said company and all the supplements thereto."

Thus, by the terms of said act, Congress reserved and retained unto itself and excluded on the part of the State, all rights and powers established by the provisions and limitations of the Act of Congress, incorporating said company, and the supplements thereto. That Congress has never in any manner sanctioned or consented to the subjection of said railway company to the general laws or to any other laws of the State of Texas, but has, as aforesaid, distinctly enacted to the contrary; that if said Act of 1873 or any other legislation of the State of Texas can be construed as a contract by said company to substitute the sovereignty of the State for that of the United States over said company, the same is in such event *ultra vires*, contrary to

and this act shall not apply to street railways nor suburban or belt lines of railways in or near cities and towns.

(b) It shall be the duty of the Commission to see that upon every railroad and branch of same carrying passengers for hire in this State shall run at least one train a day (Sundays excepted), upon which passengers shall be hauled, and the Commission shall have no power to relax this provision."

OUR FIRST CONTENTION is, that since, as hereafter shown, the State of Texas has no power to regulate the exercise of the corporate franchises of the Texas and Pacific Railway Company or its rates and charges, and since that company has the right, under the Constitution and laws of the United States, to litigate all questions growing out of the exercise of its corporate franchises, including its rates and charges, in the proper Court of the United States, said Act of the Legislature of Texas must be construed as not intended to apply to the Texas and Pacific Company in respect of the matters complained of in the bills and cross-bills.

Such a construction is necessary to prevent the act from being, as to the Texas and Pacific Company, unconstitutional.

It is not necessary to contend that this company is not subject to the usual and ordinary police regulations intended to secure and protect the safety of people of the State or their property. The main point to which the bill of complaint in this case relates is the power of the State to fix rates of charges upon the lines of the Texas and Pacific Company. As the charter of the company was granted by Congress (Act of March 3, 1871), and as the power to fix the rates is expressly reserved to Congress by the charter of the company (Sec. 15), these facts necessarily exclude, as hereafter shown, the con-

current existence of like power in the States in which the road of the company is situated.

That such concurrent power does not exist is shown by the case of the Wabash, &c., Railway Co. vs. Illinois, 118 U. S., 557 (1886). In that case it was held that the Illinois Statute which undertook to regulate the rates of transportation on such part of interstate transportation as was performed within the limits of the State of Illinois was, *even in the absence of any Act of Congress on the subject*, not within the competency of the State Legislature to enact. The Illinois Act was held void even as to that part of the transportation which was within the limits of the State of Illinois. Being interstate commerce, the power of Congress is exclusive, even if there be no Act of Congress on the subject.

The reason is that interstate commerce is not subject, in any degree, to the power of the States. The present case is still stronger against the power of the State of Texas over the Texas and Pacific Company since the charter of the company as to rates is not silent, but the power of Congress to regulate rates is expressly reserved. Power in both cannot coexist. If Congress should fix a different rate from that fixed by the Texas Commission, which would control? No one can doubt that the action of Congress would control. If so, it is because the power and jurisdiction over the subject is in Congress. If so, such power in Congress necessarily excludes the like power in the State.

the public policy of the United States, null and void, and said nullity for the reasons aforesaid was specially pleaded and urged (Record, Original Bill, Paargraphs 3 and 13; Amended Bill, Par. 2).

I.

The State Railway Commission Act, if by its terms and intent it is applicable to the Texas and Pacific Railway Company (which is denied), is unconstitutional and void as to that company on three special and distinct grounds not common to the other defendant railway companies, viz.:

(A) The Texas and Pacific Railway Company is a Federal corporation, chartered and existing under an Act of Congress, and Congress alone has the right to regulate the exercise of its corporate franchises and its rates and charges.

(B) The Texas and Pacific Railway Company has not, and could not, subject itself to the Texas legislation of May 2d, 1873, nor to any other legislation substituting the sovereignty of the State of Texas for that of the United States, in regulating the rates of freight to be charged by it, or otherwise.

(C) Under the Constitution and laws of

the United States and the decisions of the Supreme Court of the United States, The Texas and Pacific Railway Company has the absolute right to litigate the question of the reasonableness of its rates and charges in the Courts of the United States, which right the Texas Act, if held to be applicable to that company, unlawfully attempts to deny and defeat.

THE TEXAS ACT IN QUESTION DOES NOT BY ITS TRUE CONSTRUCTION APPLY TO THE TEXAS AND PACIFIC RAILWAY COMPANY.

The Act of April 3, 1891, nowhere in terms mentions the Texas and Pacific Railway Company. The power or jurisdiction given by the act to the Commission is in respect of "the different railroads in this State," "over the railroads of this State," "over each or all of the railroads subject hereto" or "subject to this act" (Sec. 3), "the railroad company affected thereby" (Sec. 4), "any railway company subject hereto" (Sec. 9), "on railroads in Texas" (Sec. 11), "any railroad subject to this act" (Secs. 14, 17). Section 22 is as follows:

'SEC. 22. The terms 'road,' 'railroad,' 'railroad companies' and 'railroad corporations,' as used herein, shall be taken to mean and embrace all corporations, companies, individuals and associations of individuals, their lessees or receivers (appointed by any Court whatsoever), that may now or hereafter own, operate, manage, or control any railroad or part of a railroad in this State, and all such corporations, companies and associations of individuals, their lessees or receivers, as shall do the business of common carriers on any railroad in this State.

(a) The provision of this act shall be construed to apply to and affect only the transportation of passengers, freight and cars between points within the State;

and this act shall not apply to street railways nor suburban or belt lines of railways in or near cities and towns.

(b) It shall be the duty of the Commission to see that upon every railroad and branch of same carrying passengers for hire in this State shall run at least one train a day (Sundays excepted), upon which passengers shall be hauled, and the Commission shall have no power to relax this provision."

OUR FIRST CONTENTION is, that since, as hereafter shown, the State of Texas has no power to regulate the exercise of the corporate franchises of the Texas and Pacific Railway Company or its rates and charges, and since that company has the right, under the Constitution and laws of the United States, to litigate all questions growing out of the exercise of its corporate franchises, including its rates and charges, in the proper Court of the United States, said Act of the Legislature of Texas must be construed as not intended to apply to the Texas and Pacific Company in respect of the matters complained of in the bills and cross-bills.

Such a construction is necessary to prevent the act from being, as to the Texas and Pacific Company, unconstitutional.

It is not necessary to contend that this company is not subject to the usual and ordinary police regulations intended to secure and protect the safety of people of the State or their property. The main point to which the bill of complaint in this case relates is the power of the State to fix rates of charges upon the lines of the Texas and Pacific Company. As the charter of the company was granted by Congress (Act of March 3, 1871), and as the power to fix the rates is expressly reserved to Congress by the charter of the company (Sec. 15), these facts necessarily exclude, as hereafter shown, the con-

current existence of like power in the States in which the road of the company is situated.

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The reason is that interstate commerce is not subject, in any degree, to the power of the States. The present case is still stronger against the power of the State of Texas over the Texas and Pacific Company since the charter of the company as to rates is not silent, but the power of Congress to regulate rates is expressly reserved. Power in both cannot coexist. If Congress should fix a different rate from that fixed by the Texas Commission, which would control? No one can doubt that the action of Congress would control. If so, it is because the power and jurisdiction over the subject is in Congress. If so, such power in Congress necessarily excludes the like power in the State.

A.

CONGRESS ALONE CAN FIX AND REGULATE RATES AND CHARGES ON THE TEXAS AND PACIFIC RAILROAD.

On the 2d day of July, 1862, Congress chartered the "UNION PACIFIC RAILROAD COMPANY" by an act whose title expresses its purposes, to wit:

"To aid in the contruction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes" (12 Stats., 489).

On the 2d of July, 1864, Congress chartered the "NORTHERN PACIFIC RAILROAD COMPANY" for like purposes (13 Stats., 365). For like purposes Congress chartered the "ATLANTIC AND PACIFID RAILROAD COMPANY," on the 27th of July, 1866 (14 Stats., 292).

There was a great demand after the War for a southern transcontinental route, and, on the 3d day of March, 1871, Congress chartered the "TEXAS PACIFIC RAILROAD COMPANY" in an act entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes" (16 Stats., 573).

To the Union Pacific Company Congress granted a subsidy of money and lands; to the other companies above named it granted a subsidy of lands.

OUTLINE OF TEXAS PACIFIC CHARTER.

The Texas Pacific charter enacts that the Texas Pacific Railroad Company (Section 1) is "hereby created a body politic and corporate in fact and in law by the name, style and title of the Texas Pacific Railroad Company, and by that name shall have perpetual

succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and use a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous line of railroad and telegraph, with appurtenances, from a point at or near Marshall, County of Harrison, in the State of Texas; thence by the most direct and eligible route to be determined by the company near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route to be selected by the company through New Mexico and Arizona to a point on the Rio Colorado at or near the southeastern boundary of the State of California; thence by the most direct and eligible route to San Diego, California; pursuing in the location thereof, as near as may be, the thirty-second parallel of north latitude, and is hereby invested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act."

Sec. 2 provides for a Board of Directors of not less than seven nor more than seventeen.

Section 3 provides that the capital stock shall not exceed $50,000,000.

Section 4 authorizes it to purchase or consolidate with any railroad company or companies heretofore chartered by Congressional, State or Territorial authority on the route prescribed in the first section of the act; but no such consolidation shall be with any competing line of railroads to the Pacific.

Section 8 grants the right of way to the company through the public lands of the United States.

Section 9 makes to it a land grant of 40 sections per mile in the Territories, and 20 sections per mile in the State of California.

Section 11 authorizes it to issue construction and land grant bonds, and its powers in this respect were enlarged by the supplemental Act of May 2d, 1872 (17 Stats., 59), which changed its name to "The Texas and Pacific Railway Company" (its present name), and enacted that that company shall possess and enjoy all the rights, privileges and franchises heretofore conferred upon the Texas and Pacific Railroad Company.

Section 2 of said amendatory act gave authority to issue construction and land grant bonds authorized by the 11th Section of the original act, not exceed-

ing $40,000 per mile of said road, as said company may deem needful to provide for the construction and equipment of its line, and to include in the mortgage or mortgages to secure said land grant bonds any portion of said lands not so used to secure the construction bonds. To provide that the land grant bonds should not exceed $2.50 per acre for all lands covered by the mortgage or mortgages securing the same. Said supplemental act provided that the aforesaid bonds and authorized capital stock, or the proceeds thereof, should be applied only for the purpose of securing the construction, operation and equipment of the contemplated railroad line under lawful contracts with such parties and on such terms and conditions as the company may deem needful, &c. (Sec. 3).

Section 5 directed when the construction should be commenced and how far it should be prosecuted, and required the completion of the road by May 2d, 1882. It also contained this provision: Upon failure so to complete it Congress may take such measures as it may deem proper to secure its speedy completion.

Section 13 of the original act required annual reports to be filed with the Secretary of the Interior exhibiting the financial situation of the company, amount of money received and expended, and the number of miles of road constructed in each year.

Section 15 prescribed certain rights in respect of intersecting and connecting roads. This section contains this proviso: "*And provided further, that the rates charged for carrying passengers and freight per mile shall not exceed the prices which may be fixed by Congress for carrying passengers and freight on the Union Pacific and Central Pacific Railroads.*"

The provisions here referred to are contained in Section 18 of the Act of July 1st, 1862, constituting the charter of the Union Pacific Railroad Co., and they are as follows:

"And be it further enacted that, whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States after deducting all expenditures, including repairs and the furnishing, running and managing of said road, shall exceed ten per centum upon its costs, exclusive of the five per centum to be paid to

the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law.

"And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend or repeal this act."

And the Act of Congress of July 2d, 1864, amendatory of said original Act of July 1st, 1862, provides as follows:

"It is further provided that, should the Central Pacific Railroad Company of California complete their line to the eastern line of the State of California before the line of the Union Pacific Railroad Company shall have been extended westward so as to meet the line of said first-named company, said first-named company may extend their line of road eastward one hundred and fifty miles on the established route, so as to meet and connect with the line of the Union Pacific road, complying in all respects with the provisions and restrictions of this act as to said Union Pacific road, and, upon doing so, shall enjoy all the rights, privileges and benefits conferred by this act on said Union Pacific Railroad Company."

The 19th Section of the Texas Pacific Charter is as follows:

"That the Texas Pacific Railroad Company shall be, and it is hereby declared to be, a military and post road; and, for the purpose of insuring the carrying of the mails, troops, munitions of war, supplies and stores of the United States, no act of the company, *nor any law of any State or Territory, shall impede, delay or prevent the said company from performing its obligations to the United States in that regard: Provided, that said road shall be subject to the use of the United States for postal, military and all other governmental services,*

at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service, and the Government shall, at all times, have the preference in the use of the same for the purpose aforesaid."

In the Texas Pacific charter Congress reserved no right to alter, amend or repeal the same.

The power of Congress to incorporate these transcontinental companies, including the Texas Pacific, is no longer questioned or questionable. Such power may rest on the commerce clause of the Constitution; on the war-power of the General Government to secure the transportation of armies and army supplies; and on the power of Congress to establish post roads, and to provide for the transportation of the mails.

McCullough vs. State of Maryland, 4 Wheaton, 316.

Osborn vs. United States Bank, 9 Wheaton, 738.

Story on the Constitution, Secs. 1128, 1137, 1138 and 1139; Mr. Justice MILLER'S opinion in Gray vs. Chicago, &c., R. R. Co., 1 Woolworth, 63;

and the various cases in this Court, in which the Union and Central and Northern Pacific Companies have been parties.

It will be observed that the Texas and Pacific Company is created by Congress, and that it derives its entire corporate existence and all of its franchises from Congress. Congress is its sovereign. The United States alone has visitatorial power over it, and can call it to account for the use or abuse of its powers. Like the other transcontinental railway companies above mentioned, the Texas and Pacific Company was created by Congress, and was made by it an agent of the Gen-

eral Government to carry into execution the powers of the General Government in relation to commerce, to postal, military and other matters. These transcontinental railways chartered by Congress are, therefore, Federal instrumentalities. In the Texas and Pacific charter this is expressly declared in Section 19, above quoted. In fact, the whole scheme and purpose of the act was to make the Texas Pacific Company a Federal instrumentality. *Indeed, Congress would have no power to incorporate it except for National purposes.* It is, in all substantial respects, like the Union Pacific Railroad Company, which company has been adjudged by this Court to be a Federal instrumentality (U. P. R. R. Co. vs. Peniston, 18 Wall., 5; U. S. vs. U. P. R. R. Co., 91 U. S., 72, 79, 80, 81).

In this last case the Court said (p. 80):

"This enterprise was viewed as a national undertaking for national purposes. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace, even, of an improved and cheaper method for the transportation of the mails and of supplies for the army and the Indians. * * * It is true (p. 81) the scheme contemplated profit to individuals; for, without a reasonable expectation of this, capital could not be obtained, nor the requisite skill and enterprise. But this consideration does not in itself change the relation of the parties to the suit. This might have been so if the Government had incorporated a company to advance private interests, and agreed to aid it on account of the supposed incidental advantages which the public would derive from the completion of the projected railway. But the primary object of the Government was to advance its own interests, and it endeavored to

engage individual co-operation as a means to an end—the securing of a road which could be used for its own purposes. The obligations, therefore, were imposed on the company incorporated to build it."

All this is as true of the Texas and Pacific as it is of the Union Pacific. The effect, therefore, of the incorporation of the Texas and Pacific by Congress, and of the various provisions in its charter, is necessarily to make the Texas and Pacific a corporation of the General Government, which is its sovereign, and to withdraw the control of the Texas and Pacific and its franchises from the States and Territories through which the road might run, except so far as the police and taxation laws of such States and Territories might lawfully be made to apply to it. One railway company cannot have two masters—the General Government and the State. The transcontinental roads are required to be of uniform gauge, to make uniform or reasonable rates for transportation of freight and passengers; to be operated and used as continuous lines; all of which is inconsistent with any control of the operation and franchises of the road by State Legislatures.

The relations of the Union Pacific to the Government are, among other cases, specially considered in Thomson vs. Kansas Pacific Railroad Co., 9 Wall., 579, and the Railroad Co. vs. Peniston, 18 Wall., 5 (*Re* Union Pacific). In these cases it was held that the Kansas Pacific and the Union Pacific Companies were respectively subject to the State taxation on their property, and this was so held on the distinct ground that the charters were silent as to this subject, and that taxation of the "property" merely was a different thing from a tax on the "franchises or operations of the company." On this ground the cases were distin-

guished from McCulloch vs. Maryland, and Osborn vs. Bank of the United States. In the case of McCulloch, as explained by STRONG, J.:

"The tax was held unconstitutional which was laid upon the notes of the bank. The bank was prohibited (by the State Legislature) from issuing notes at all except upon stamped paper furnished by the State, and to be paid for on delivery, the stamp upon each note being in proportion to its denomination. The tax, therefore, was not upon any property of the bank, *but upon one of its operations*: in fact upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank" (18 Wall., 35).

The same learned Justice, in relation to the Osborn case, says:

"In Osborn vs. The Bank the tax held unconstitutional was a tax upon the existence of the bank—upon *its right to transact business within the State of Ohio*. It was, as it was intended to be, a direct impediment in the way of those acts which Congress, for national purposes, had authorized the bank to perform. For this reason the power of the State to direct it was denied, but at the same time it was declared by the Court that the local property of the bank might be taxed, and, as in McCulloch vs. Maryland, a difference was pointed out between a tax upon its property and one upon its action" (18 Wall., 35).

The learned Justice thus proceeds (p. 35):

"In noticing an alleged resemblance between the bank and a government contractor, Chief-Justice MARSHALL said: 'Can a contractor for supplying a military post with provisions be restrained from making purchases within a State, or from transporting provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not heard these questions answered in the affirmative. It is true the property of the contractor may be taxed; and so may the local property of the bank. But we do

not admit that the act of purchasing, or of conveying the articles purchased, can be under State control.'"

And this Court accordingly held that the Union Pacific could be taxed upon its road and property, since, in the language of this Court,

"It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

BRADLEY and FIELD, JJ., dissented even from this view, holding that the States could not even tax the Union Pacific upon its property, and claiming that such was the necessary effect of the decisions of McCulloch vs. Maryland, Osborn vs. The Bank, and Weston vs. City of Charleston (2 Pet., 466). In this last case the Court said:

"That all subjects to which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation.

"*That the sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, but not to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States.*

"That the attempt to use the power of taxation on the means employed by the Government of the Union in pursuance of the Constitution is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.

"That the States have no power by taxation or otherwise to retard, impede, burden or in any manner control the operation of the Constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

Mr. Justice BRADLEY, speaking of the Union Pacific Company, says (18 Wall., 47):

"*As an instrument of national commerce, as well as*

Government operations, it has been regulated by Congress. Can it be further regulated by State legislation? Can the State alter its route, its gauge, its connections, ITS FARES, *its franchises, or any part of its charter?* Can the State step in between it and the superior power or sovereignty to which it is responsible? Such an hypothesis, it seems to me, is inadmissible and repugnant to the necessary relations arising and existing in the case. Such an hypothesis would greatly derogate from and render almost useless and ineffective the hitherto unexecuted power of Congress to regulate commerce by land among the several States."

It was conceded by the majority of the Court in the Peniston case (18 Wallace) that if the tax was imposed upon the franchises or the right of the Union Pacific Company to exist or perform the functions for which it was brought into being it would be invalid. The Court's language on this subject is as follows:

"In this case the tax is laid upon the property of the Railroad Company precisely as was the tax complained of in Thomson vs. The Railroad Company. It is not imposed upon the franchises or the right of the company to exist or perform the functions for which it was brought into being."

It is evident from this that even the power to tax would have been held to be unauthorized and invalid if the tax had been imposed upon the operations or franchises of the company.

The States may exclude or restrict corporations of other States from doing business therein provided such exclusion or restriction does not interfere with interstate or foreign commerce, and then they cannot; but the States cannot exclude or restrict any corporation created by or which is in the employ of the Federal Government. They cannot lay the weight of their little finger upon such corporations.

Pembina Mining Co. vs. Pennsylvania, 125 U. S., 189, 190.

These principles establish that the franchises of the Texas Pacific, including its most vital franchise of fixing rates and fares (subject to the reserved right of the Congressional control in the exigency specified and provided for in Sec. 15 of its charter), are Federal franchises conferred for Federal purposes, and therefore necessarily subject only to Federal regulation and control. The necessary result is that the Texas Railway Commission cannot be invested by the State with any authority without the consent of Congress, which has never been given, to fix or establish any rates of fare or charges which shall have any operation or effect on the Texas and Pacific Company.

Can Congress legislate upon and regulate rates of fare and charges on the Texas and Pacific Company? No one doubts it. It is so expressed in the charter of the company (Sec. 15). THIS IS DECISIVE OF THE QUESTION, for if *Congress* can fix and regulate tariffs, then the *State* cannot. The powers are not and cannot be concurrent.

[In order to avoid cross-references, we here give at length two authorities, cited by cross-complainant in its brief, and which are so strongly in point that the Court will pardon the iteration.]

In the case of California vs. Central Pacific Railway Company, 127 U. S., 1, the Court illustrated the application of this principle to toll charging franchises of railroad companies created as agencies of the general government. The question presented in this case was of the power of the State of California to impose a tax upon the general franchise of the company, including franchises which had been conferred upon it by Congress. The Court, by Mr. Justice BRADLEY, said:

"Another defense set up by the Central Pacific Railroad Company, in the three cases against it, namely, No. 660, 664 and 1157, and by the Southern Pacific Railroad Company, in No. 661, is that the State Board of Equalization included in their assessment in said cases, the value of the franchises conferred upon said Company by the United States, which, it is contended, is repugnant to the Constitution and laws of the United States, and therefore void.

* * * * * *

"Assuming then that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes, and to subserve national ends. It seems very clear that the State of California can neither take them away nor destroy nor abridge them nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. What is a franchise? Under the English law, Blackstone defines it as 'a royal privilege or branch of the King's prerogative subsisting in the hands of a subject' (2 Com., 37). Generalized and divested from the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents acting under such conditions and regulations as a government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway or a public ferry or railroad, or charge toll for the use of the same, without authority from the Legislature direct or derived. These are franchises. No private person can

take another's property even for a public use without such authority, which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed or render it valueless. As Chief-Justice MARSHALL said in McCulloch vs. Maryland, 4 Wheat., 316, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme laws of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subject to taxation by a State. The power conferred emanates from and is a portion of the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this Court in McCulloch vs. Maryland, 4 Wheat., 316; Osborn vs. Bank of U. S., 9 Wheat., 738, and Brown vs. Maryland, 12 Wheat., 419; and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decision of this Court in Thompson vs. Union Pacific Ry. Co., 9 Wall., 579, and Union Pacific Railroad Co. vs. Penniston, 18 Wall., 5. As explained in the opinion of the Court in the latter case, the tax there was upon the property of the company, and not upon its franchises or operations, 18. Wall., 35, 37."

In the suit of Farmers' and Mechanics' National Bank vs. Dearing, 91 U. S., 29, the question involved was the right of the States to exercise control over national banks, the inquiry being into the right of the State of New York to pass a usury law that would be

binding and controlling upon business done by national banks in that State. Justice SWAYNE, delivering the opinion of the Court in that case, uses the following language:

"The national banks organized under the act are instruments designed to be used to aid the Government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge; being such means brought into existence for this purpose and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.' Against the national will the States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general Government. * * * 'The power to create carries with it the power to preserve.'" * * *

The Court, after citing the case of Osborn against The Bank, and Weston against Charleston, continues:

"The principle announced in the authorities cited is indispensable to the efficiency or independence, and, indeed, to the beneficial existence of the general Government. Otherwise it would be liable in the discharge of its most important trusts to be annoyed and thwarted by the will or caprice of every State in the Union. Infinite confusion would follow. The Government would be reduced to a pitiable condition of weakness. The form might remain the same, but the vital essence would have departed. In the complex system of polity which obtains in this country, the powers of government may be divided into four classes:

"Those which belong exclusively to the States;

"Those which belong exclusively to the National Government;

"Those which may be exercised concurrently and independently by both;

"And those which may be exercised by the States, but only with the consent, expressed or implied, of Congress.

"Whenever the will of the nation intervenes exclusively in this class of causes, the authority of the State retires and lies in abeyance until the proper occasion for its exercise shall recur (Gilman vs. Philadelphia, 3 Wall., 713; *Ex parte* McNeil, 13 *Id.*, 240). The powers of the States to tax the existing national banks lies within the category last mentioned.

"It must always be borne in mind that the Constitution of the United States 'and the laws which shall be made in pursuance thereof' are the 'supreme laws of the land' (Constitution, Art. 6). And that *this law is as much a part of the law of each State, and as binding upon its authorities and the people as its own local Constitution and laws.*" [Italics are ours.]

Bank vs. Dearing, 91 U. S., 34, 35.

B.

The Texas and Pacific Railway Company has not and could not subject itself to the Texas Act of May 2d, 1873, nor to any other legislation substituting the sovereignty of the State of Texas for that of the United States in regulating the rates of freight to be charged by it, nor otherwise.

It has been suggested that the Texas and Pacific Railway Company, by accepting the Act of the Legislature of Texas, passed May 2d, 1873, conferred upon the State the right to regulate its tariffs and charges. That act was an

"Act to adjust and define the rights of the Texas and Pacific Railway Company within the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific Ocean."

THE TEXAS AND PACIFIC RAILWAY COMPANY DID NOT INTEND TO SURRENDER, NOR DID IT ACTUALLY SURRENDER TO THE STATE THE EXERCISE OF ANY OF ITS FRANCHISES. ITS STIPULATION WAS THAT THE GENERAL LAWS OF THE STATE APPLICABLE TO OTHER RAILROADS CONSTRUCTED WITHIN THE STATE—*i. e.*, LAWS APPLICABLE TO THE PROPERTY—POLICE REGULATIONS—SHOULD ALSO BE APPLICABLE TO IT.

The provision of this act, which it is suggested operates to invest the State with the right to regulate and control the rates and charges for the carriage of passengers and freight by the Texas and Pacific Railway Company, is contained in the 9th Section, which is as follows:

"SEC. 9. That the above grants, donations and reservations are made to the said Texas and Pacific Railway Company, a corporation created by an Act of the Congress of the United States, approved March 3d, 1871, as the assignee of and successor of the rights, privileges and franchises of the Southern Transcontinental and the Southern Pacific Railroad Companies, corporations created by the laws of Texas, with the intent and distinct understanding that the same shall be accepted by said Texas and Pacific Railway Company in full satisfaction of any claims for money, bonds or lands to which said company might be entitled under the act entitled 'An Act to encourage the speedy construction of a railway through the State of Texas to the Pacific Ocean,' passed May 24th, 1871, and 'An act amendatory of and supplementary thereto,' passed November 25th, 1871, or by virtue of the consolidation of said Texas and Pacific Railway Company with the Southern Transcontinental Railway Company and the Southern Pacific Railroad Company, or by virtue of the charters of either of said railroad companies, or by virtue of any railroad franchise granted by the State of Texas, purchased or acquired by either of said companies, or by the Texas and Pacific Railway Company, or by virtue of any general or special law of this State; and in full satis-

faction of all claims or demands for bonds, lands or money of said Southern Pacific and Southern Transcontinental Railroad Companies against the State of Texas; *and said Texas and Pacific Railway Company shall be subject to such general laws as may be enacted by the Legislature applicable to other* RAILROADS CONSTRUCTED *within this State;* and that all the property of the said corporations, or either of them, now or hereafter situated in this State shall be hereafter subject to taxation by the laws of this State."

We think it will be obvious that the purpose and effect of this stipulation was to subject the Texas and Pacific Railway Company to the police regulations of the State in the operation of its property. It will be observed that the language is this: "Said Texas and Pacific Railway Company shall be subject to such general laws as may be enacted by the Legislature applicable to other *railroads constructed* within this State," not to such general laws as may be enacted by the Legislature applicable to other *companies incorporated* by this State. The stipulation is that the State may exercise its police power regulating the use of this company's *railroad* in the same way that it may exercise this power in regulating the use of other *railroads constructed* within the State. The following clause emphasizes this view:

"And that all the property of the said corporations, or either of them, now or hereafter situated in this State shall be hereafter subject to taxation by the laws of this State."

Both of these provisions relate to the *property*, and not to the *franchises*. The one is a reservation of police power, the other a reservation of the power of taxation. It will be remembered that both of these reservations were thus made prior to the decisions of

this Court, to the effect that agencies of interstate commerce are subject to the police regulations of the State, and that the property of Federal corporations is subject to the taxing power of the State.

It is true that the case of Thomson vs. Union Pacific Railroad Company, Eastern Division (above referred to) had been decided in 1870; but that case involved the question of the right of the State to tax the property of a company which had derived its existence from State legislation, although adopted by Congress as a part of the Pacific Railroad organization. In that case Chief-Justice CHASE said:

"We do not think ourselves warranted, therefore, in extending the exemption established by the case of McCulloch vs. Maryland, beyond its terms. We cannot apply it to the case of a corporation deriving its existence from State law, exercising its franchise under State law, and holding its property within State jurisdiction and under State protection."

The distinction intimated in this language and urged in the argument of counsel in the later case of Union Pacific Railroad Co. vs. Peniston *(supra)*, was discussed by the Court in that case and finally disposed of—the Court then, for the first time, holding that the property of corporations chartered by Congress was subject to State taxation.

It will thus be seen that the decision in the Thomson case left open the question of the right of a State to tax the property of a railroad company chartered and created by an Act of Congress as a Federal instrumentality. It was while this question was still open, and before the conclusive judgment in the Peniston case (decided December 15, 1873) had been pronounced, that the State of Texas, by this provision of the Act of

1873, stipulated for the right to tax the property of the Texas and Pacific Railway Company.

And so the doctrine that States may control railway companies, engaged in interstate commerce, by police regulations of the use of their property within State limits was then in a formative stage. The limits of this right were undefined. The State of Texas, therefore, reserved by stipulation in this Act of 1873 the right to apply to the Texas and Pacific Railway Company "such general laws as may be enacted by the Legislature applicable to other *railroads* constructed within this State"—general laws affecting the *railroads and their operation*, not general laws affecting *companies incorporated by the State, or their franchises or internal concerns*. The reserved power is to control the company in respect to its property, not in respect to its charter rights and franchises.

But, had the intention been otherwise, then

(1) THE TEXAS AND PACIFIC RAILWAY COMPANY HAS NEVER MADE A VALID SURRENDER OF ANY OF ITS FRANCHISES TO THE STATE, NOR DID IT EVER INVEST THE STATE WITH THE POWER TO REGULATE ITS EXERCISE OF ITS OWN FRANCHISES.

(2) THE TEXAS AND PACIFIC RAILWAY COMPANY COULD NOT HAVE MADE A VALID SURRENDER OF ANY OF ITS FRANCHISES, AND COULD NOT HAVE INVESTED THE STATE WITH THE POWER TO REGULATE THE COMPANY'S EXERCISE OF ITS OWN FRANCHISES GRANTED BY A POWER SUPERIOR TO THE STATE OF TEXAS, AND GRANTED FOR THE CONSTITUTIONAL PURPOSES OF THE GENERAL GOVERNMENT.

Whether the company ever did make such surrender is fully discussed in the above statement of the case, taken from the pleadings. Upon this question, as also

upon the *power* to make such a surrender, we further submit the following remarks:

It would not have been competent or possible for the Texas and Pacific Company to have transferred to the State of Texas, or to its Legislature, the powers of the United States and of Congress. No stipulation could be effectual to vest in the State the visitatorial powers of Congress. It was beyond the power of the company to relinquish the franchises conferred upon it by Congress, or to invest the State with the right to exercise these franchises, or with the control of their exercise by the company. The ultimate right to regulate the rates and fares for carriage of persons and property was reserved by Congress. This supreme and vital franchise was conferred upon the railway company, subject to the revisory power of Congress, and to that power alone.

The sovereign power of regulation cannot coexist in the Congress of the United States and in the Legislature of the State of Texas. Without its consent Congress may not be divested of this power. Any attempt to accomplish this by a stipulation or statutory contract between the State of Texas and the railway company must be wholly ineffectual and void. But no such attempt was made and the language of the statute will not be strained in its construction—the word "railroad" will not be read "company" and the word "constructed" will not be read "incorporated" to the end that a purpose may be read into the statute, which is in conflict with the organic law of the company.

It would require apt and unmistakable language to bear the construction that the purpose and effect of this stipulation was a resignation to the State of the control and regulation of corporate franchises of para-

mount and supreme importance. The language of the two clauses above referred to aptly reserves the right to apply police regulations of the State to the Texas and Pacific Railway Company in the use and operation of its property, and the right to tax that property. This language is apt for no other purpose.

The act of the Legislature of Texas, passed May 24th, 1871, entitled "An Act to encourage the speedy construction of a railway through the State of Texas to the Pacific Ocean," provided for the donation by the State to Southern Trans-continental and the Southern Pacific Companies of the eight per cent. bonds of the State to the amount of $3,000,000 each—$6,000,000 in all—upon certain conditions specified in the act in respect to the time within which their roads should be completed. That act (Section 11) provided:

"All the rights, benefits and privileges granted and intended to be secured by this act to the Southern Pacific Railroad Company and to the Southern Trans-continental Railway Company shall pass to and vest in the Texas Pacific Railroad Company, a corporation created by and under the laws of the United States by an Act of Congress approved March 3d, A. D. one thousand eight hundred and seventy-one, whenever the said Southern Pacific Railroad Company and the said Southern Trans-continental Railway Company shall have been consolidated with the said Texas Pacific Railroad Company."

The Act of May 2, 1873 (the one in question here), recited the Act of May 24th, 1871, and the consolidation with the Texas and Pacific Railway Company of the Southern Trans-continental and the Southern Pacific Companies, reciting further the desire

"That there should be a complete and final adjustment of the rights of said Texas and Pacific Railway Company as the assignee and successor of the said Southern Pacific Railroad Company and the said South-

ern Transcontinental Railway Company, under the laws of this State, and a definitive understanding as to the obligations of the State."

By this act a grant of twenty alternate sections per mile of road constructed (instead of twenty-four sections, as provided in the Act of May 24th, 1871) was made to the company as a substitute for the eight per cent. State bonds contemplated in the original act. The construction of this Act of May 2, 1873, was one of the questions before this Court in the Pacific Removal Cases, 115 U. S., 1. In the printed briefs in the case of the Texas and Pacific Railway Company by counsel for McAlister and Murphy (defendants in error in two of the Removal Cases) it was said:

"By the Texas Act of May 2, 1873, the right of consolidation conferred by the previous act is referred to, and it is provided 'that whereas, it appears that such consolidation has been effected, the said Texas Pacific Railroad, as the successor of the Southern Pacific Railroad, and as the successor of the Southern Trans-continental Railroad Company, a corporation of the State of Texas, shall construct, &c.' The act specifies the line of the road to be built and defines the rights of the Texas and Pacific Railroad as the successor of the Texas corporations (Laws of Texas, Special, 1873, p. 318)." (In passing, it may be here observed that the Texas act refers to the Texas and Pacific Railway Company, as the *assignee* as well as the successor of the State corporations.) The brief in the cases last referred to proceeds thus: "The rights of the Texas and Pacific Railway Company in the State of Texas are possessed and exercised as the successor of the Southern Pacific Railway Company, a State corporation. As such successor it can claim no greater immunities or privileges than could have been claimed or exercised by the company which it succeeded, and accordingly it was not entitled to claim a removal of this action on the ground that it was a United States corporation. A similar question regarding the Union Pacific Railway as the successor of the Kansas Pacific is presented in the case of *Union Pacific Railway vs. Kansas City*."

In passing on the effect of the assignments to the Texas and Pacific Railway Company of the rights and privileges of the Texas corporations, or of the consolidation of the Texas companies into the Texas and Pacific Railway Company, this Court (in the Removal Cases, 115 U. S., p. 16) says:

"With regard to transactions occurring in Nebraska on the original line of the Union Pacific Railroad Company, it is not disputed that the present company derives all its corporate and other powers from the Acts of Congress, and is strictly and purely a United States corporation; and the Texas and Pacific Railway Company stands in the same predicament and occupies the same position in Texas in relation to consolidation with State organizations as the Union Pacific does in Kansas, and the same considerations apply to both. It was originally incorporated by the name of the Texas Pacific Railroad Company by Act of Congress, approved March 3d, 1871 (16 Stat., 573), with power to construct a railroad from Marshall, Texas, to San Diego, on the Pacific Coast, and to purchase or consolidate with any railroad company chartered by Congressional, State or Territorial authority on the same route. Under this act and by authority of the Legislature of Texas, a consolidation was effected with the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company, corporations of Texas, and by Act of Congress of May 2, 1872 (17 Stat., 59), the name of the company was changed to the Texas and Pacific Railway Company. The powers, privileges and advantages given to the company by Congress, and the duties imposed upon it, are specified in the acts referred to. It comes clearly within the reason and conclusion applied to the Union Pacific Railway Company."

The conclusion applied to the Union Pacific Railway Company is found at page 16 of the same opinion, where it is held that the plaintiff in error (Union Pacific Company)

"Must be regarded as a corporation organized under and by virtue of the laws of the United States."

And the Court proceeds to say:

"And the whole being, capacities, authority and obligations of the company thus consolidated are so based upon, permeated by and enveloped in the Acts of Congress referred to that it is impracticable, so far as the operations and transactions of the company are concerned, to disentangle those qualities and capacities which have their source and foundation in these acts from those which are derived from the State or Territorial authority" (p. 16).

C.

UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES AND THE DECISION OF THE SUPREME COURT OF THE UNITED STATES THE TEXAS AND PACIFIC RAILWAY COMPANY HAS THE ABSOLUTE RIGHT TO LITIGATE THE QUESTION OF THE REASONABLENESS OF ITS RATES AND CHARGES IN THE COURTS OF THE UNITED STATES, WHICH RIGHT THE TEXAS ACT UNLAWFULLY ATTEMPTS TO DENY AND DEFEAT.

The Constitution of the United States (Art. 3, Sec. 2) ordains that the judicial power of the United States shall extend to all cases, in law and equity, arising under that Constitution, the laws of the United States, and to treaties made or which shall be made under their authority; * * * to controversies between a citizen of a State and citizen of another State, and between citizens of different States.

It is settled law that the corporations of the United States created by and organized under Acts of Congress are entitled to sue and to be sued in the Courts of the United States, on the ground that all suits, even suits for damages for personal injuries to passengers and employees caused by such railroads, are suits "arising under the laws of the United States." This is

specifically so decided as respects the Texas and Pacific Railway Company in the case of the Texas and Pacific Railway Co. vs. McAlister; the Texas and Pacific Railway Co. vs. Kirk, and the Texas and Pacific Railway Co. vs. Murphy, which, among other cases, were embraced in the Pacific Railroad Removal Cases, reported in 115 U. S., 1 (1884). This doctrine was reaffirmed by this Court in the most decisive manner in the case of the Texas and Pacific Ry. Co. vs. Cox, 145 U. S., 593. It was held in the Pacific Removal Cases, following the great case of Osborn vs. Bank of the United States, 9 Wheat., 738, and the case of Ames vs. Kansas, 111 U. S., 449 (*quo warranto* against the Kansas Pacific Railway Company), that since every case against a Federal corporation is a case arising under the law of Congress which chartered it, every such corporation, including the Texas and Pacific Railway Company, had, under the Act of March 3, 1875, the right to remove into the Circuit Courts of the United States all suits brought against such company in the State Court, and this on the sole ground that such suits are necessarily suits arising under the laws of the United States.

It is thus settled that the Texas and Pacific Company has the absolute right, under the Constitution and laws of Congress, to bring all suits of whatever character in the Circuit Courts for the State of Texas. It is likewise settled that such right cannot be defeated or abridged by State legislation. For it is a general and acknowledged principle that neither their jurisdiction nor the right given by the Constitution and laws of the United States to resort to the Courts of the United States can be interfered with or touched by State authority or State legislation. This is very pertinently

illustrated in the case of the Insurance Company vs. Morse, 20 Wall., 445, where it was held that a State statute which allowed a foreign corporation to do business only on condition that it would agree not to remove suits against it to the Federal Court is unconstitutional, and such agreement, though entered into by the company, is void.

In that case, pursuant to the Statute of Wisconsin, the insurance company duly executed a written instrument and filed the same with the Secretary of State, to the effect that such company would not remove any suit against it for trial into the United States Circuit Court or any Federal Courts. It was held that the obstruction to the right to Federal jurisdiction imposed by the Statute of Wisconsin was repugnant to the Constitution of the United States and the laws passed in pursuance thereof, and was illegal and void. It was likewise held that the agreement of the insurance company so filed in pursuance of the act is as void as if no such prohibitory or restrictive statute had been passed. The State Courts having refused to allow a removal in a case within the Statutes of the United States on the subject of removals, and, having rendered judgment against the insurance company, this Court held that the refusal of the State Courts to allow the removal was erroneous, and that the judgment of the State Courts and all subsequent proceedings were illegal; and such judgment was reversed by the Supreme Court of the United States.

The invalidity of the agreement to give up the right of removal is discussed by the Court at length, and many cases cited in support of the Court's conclusion, to which we refer the Court. We make but two extracts:

"Should a citizen of the State of New York enter into an agreement with the State of Wisconsin that in no event would he resort to the Courts of that State or to the Federal tribunals within it to protect his rights of property, it could not be successfully contended that such an agreement would be valid. We see no difference in principle between the case supposed and the case before us. Every citizen is entitled to resort to all the courts of the country and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. * * * The jurisdiction of the Federal Courts under this clause of the Constitution (Art. 3, Sec. 2) depends upon and is regulated by the laws of the United States. State legislation cannot confer jurisdiction upon the Federal Courts, *nor can it limit or restrict the authority given by Congress in pursuance of the Constitution.* This has been held many times"—the Court citing Railway Co. vs. Whitton, 13 Wall., 286; Payne vs. Hook, 7 *Id.*, 427; the Moses Taylor, 4 *Id.*, 411, and cases cited.

The case of the Insurance Co. vs. Morse, *supra*, was approved and followed in Barron vs. Burnside, 121 U. S., 186 (1886), and in Doyle vs. Ins. Co., 94 U. S., 535, it was explained and distinguished.

In the case of Railway Co. vs. Whitton, just cited, the statute of Wisconsin enacting Lord Campbell's Act —that is, giving an action for the death of a person caused by the wrongful act of another, contained this proviso, to wit:

"That such action shall be brought for a death caused in this State in some court established by the Constitution and laws of the same."

It was held that this proviso did not prevent a non-resident plaintiff from removing the action, under the Act of Congress of March 2d, 1867, against a resident railway company to a Federal court and maintaining it there. This was done on the ground, as stated by the Court, that the proviso was not "in the nature of a

condition, upon a compliance with which the remedy given by the statute can only be enforced." On the contrary, it was a statute which conferred a general right, and in such cases the rule is that:

"Where a general right is thus conferred, it can be enforced in any Federal court within the State having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of State legislation that it shall only be enforced in a State court. The statutes of nearly every State provide for the institution of numerous suits, such as for partition, foreclosure and the recovery of real property, in particular courts and in the counties where the land is situated, yet it never has been pretended that limitations of this character could affect, in any respect, the jurisdiction of the Federal court over such suits where the citizenship of one of the parties was otherwise sufficient. Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the Court, in such case, is not subject to State limitations" (13 Wall., 285, 286).

The case at bar is obviously not within this principle, since the Texas Railway Commission Act does not confer any general property or personal rights on the railway companies, but it attempts to enact a restrictive provision that the constitutional and lawful right of the railway companies to be relieved against unjust or unreasonable rates fixed by the Commission shall be exclusively asserted in the single court of Travis County; and the whole scheme of the act, so far as rates and penalties are concerned, is made to depend upon the peculiar provisions of the act, that the rates fixed by the Commission should be *conclusive* in favor of private parties, until the railway company should, in a direct proceeding, which the statute says shall be

brought in a single, specified Court of the State, obtain the final judgment of that Court that the rates fixed by the Commission are unreasonable or unjust.

If this statute applies to the Texas Pacific Company, then the rates fixed by the Commission are declared to be *conclusive* upon it until it submits to go into the State Court of Travis County and there litigate the question. The State of Texas had no power to deprive the Texas Pacific Company of its constitutional and lawful right to have this question decided by the proper Courts of the United States, and if it files such a bill in the Courts of the United States their judgment in favor of the Texas Pacific would, if the State statute is valid, be no answer to suits against it for penalties under the State Act, since the express provision of the act is that the Commission rates are conclusive until a judgment of the Travis County Court is obtained.

If this part of the State Act does not apply to the Texas Pacific Company, it must be on the ground that no part of that act applies to that company, and, if so, then the Commission's rates are not applicable to it. They are beyond and outside of the act, and as the Commission are asserting the right to control rates of the Texas Pacific Company, and threaten to subject it to multiplied penalties and to a great multiplicity of suits, it and its mortgage bondholders are entitled to the injunction and relief here sought.

II.

Facts of the case as to cost of road, indebtness, effects of tariffs, &c.

The MILEAGE of defendant railway company in the States of Texas and Louisiana is 1,499 miles (Original Bill, paragraph 3, and Exhibit H, Amended Bill and Cross-Bill).

The COST OF THE CONSTRUCTION and equipment of the lines of railroad owned and operated by the defendant company was $50,000 per mile (Amendment to Original Bill, par. 1).

The COST OF REPLACEMENT OR DUPLICATION of the lines of railroad and equipment of the defendant company would be not less than $30,000 (Amendment to Complainant's Bill, par. 1).

The BONDED INDEBTEDNESS of the defendant company is at the rate of $33,355 per mile operated by it, and bears interest (except as to a very small proportion unexchanged under reorganization) at the rate of five per cent. Only one-half of this interest charge is obligatory —the second mortgage bonds of the company being income bonds. The first mortgage bonds aggregate $25,000,000, and the second mortgage bonds a like sum (Record, Original Bill, paragraphs 4 and 5).

The STOCK ISSUED by the defendant railroad company and outstanding amounts to $38,710,900, or at the rate of $25,834.48 per mile (Record, Cross-Bill, par. 2).

It thus appears that the entire bonded indebtedness of the defendant company is outstanding at a rate about $17,000 per mile less than the actual cost of its physical properties and that its bonded indebtedness bearing a fixed or an obligatory interest charge is out-

standing at upwards of $33,000 less than such actual cost.

The OPERATING EXPENSES of the defendant company were at the time when the Railroad Commission began its work reduced to a minimum consistent with safety and with adequate service to the company and the public. Its supplies, material and property for the operation of its road were secured at the cheapest market price and in amount no more than actually necessary for the purposes of operation. Its operating expenses are shown with absolute exactitude and in complete detail (Record, Exhibits H to amended bill and cross-bill). The number of its officers, employees and laborers and the number of days in which they had worked, their total yearly compensation and their average daily compensation, distributively and in the aggregate, are also shown. By allegations the truth of which is conceded and by exhibits and schedules whose accuracy is admitted, it is shown that the operating expenses of the railroad are at a minimum consistent with safety and adequate service. The revenue of the railway company for the year ending June 30th, 1891, allowing $366,655.01 for improvements of a permanent nature, show a surplus over operating expenses and interest on first mortgage bonds of only $23,681.29, which was all that could have been devoted to payment of interest upon the second mortgage income bonds; and it further appears that during the year ending June 30th, 1892, allowing $310,034.39 for permanent improvements, there was a deficit in the earnings of the amount necessary to pay operating expenses and interest on first mortgage bonds (obligatory) of the sum of $433,131.23 (see Exhibits H and I, made part of amended bill; p. 31 of each exhibit).

To state the matter a little differently. It appears from page 31 of Exhibits H and I that the road earned for the year ending June 30th, 1891, $1,895,874.89, over and above its operating expenses whilst its interest charge upon its debt amounting in round numbers to $50,000,000 amounted to $2,500,000, showing a deficit of $604,125.11; and for the year 1892, the road earned $1,396,170.74, with a like interest charge, showing a deficit of $1,103,829.26.

With the actual cash investment far in excess of its funded obligations; with its bonds bearing less than the minimum rate of interest established by the laws Texas (as lately amended and reducing the legal rate to six per cent.); with its property operated as economically as was consistent with safety to the company and to the public; with its earnings insufficient to pay the interest upon its funded debt; with its rates forced by actual commercial and competitive conditions to an abnormally low and unproductive basis; with the interest upon its securities unearned—with these as the existing conditions, the Railroad Commission began its work of reduction of rates, and it completed its work at the date of the preliminary injunction with reductions resulting in the diminution of net revenues at the rate of $400,000 per annum, as compared with the result of the inadequate and insufficient rates which were in existence at the time when the commission began its work. Between the 9th day of September, 1891, and the date of the preliminary injunction, August 22d, 1892, 23 tariffs were announced by the commission and put into effect; its tariffs, of course, operating upon the revenues for various periods (that is, from the respective dates at which they were made effective) ranging from

a period of a little less than a year as to some tariffs to a period of about one month as to the last. The total loss sustained by the railroad company in net revenue from the operations of these tariffs until July 31, 1892, amounted to $252,102.72, and the tariffs effected an average reduction in the rates, ranging from seven per cent. in the case of stone and sand to eighty per cent. in the case of fire brick (see table of reductions, paragraph 1 of amendment to bill of complaint). The Commission reduced every tariff which it touched, and its work effected the reduction in the net revenues of the railroad company at a rate exceeding $400,000 per annum, or nearly one-third of its fixed interest charge, and about one-third of the amount annually available for the payment of interest on its obligations.

All this was done in face of the fact that the operation of the competitive conditions surrounding this company have resulted in the reduction of its revenue per ton per mile from 5.13 in 1875 to 1.26 in 1890, which rate was the lowest derived by the railway company from the operation of its property (Record, paragraph 10 of original bill herein). A statement of the facts of this case is its most cogent and conclusive argument, and we respectfully submit that the decree of the lower court is correct and should be affirmed.

JOHN F. DILLON,
E. B. KRUTTSCHNITT,
JOHN J. MCCOOK,
Of Counsel for Trust Company, Appellee.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1893—No. 1167.

JOHN H. REAGAN ET AL,
Appellants,

AGAINST

THE MERCANTILE TRUST COMPANY and the TEXAS AND PACIFIC RAILWAY COMPANY,
Appellees.

Statement and Brief on Behalf of the Texas and Pacific Railway Company.

This cause is submitted to the Court upon the briefs and arguments filed by us, and also by complainants in cause No. 928 of this term, upon the brief and statement of facts filed on behalf of complainant and bound under same cover herewith, and upon the following additional argument of those points wherein this cause differs from any of the others of the series submitted simultaneously with it (Record, Original Bill, paragraph 13; Cross-Bill, paragraph 9; Amendment to Bill, paragraph 2; Amendment to Cross-Bill, paragraph 2), and which points are very fully discussed in said brief of complainant, to which this argument is merely supplementary.

THE RATES AND CHARGES OF THE TEXAS AND PACIFIC RAILWAY COMPANY ARE NOT SUBJECT TO STATE LEGISLATION.

The Texas and Pacific Railway Company was incorporated by an Act of the Congress of the United States, approved March 3, 1871, and the Acts supplemental thereto. Its incorporation was an exercise of the Federal sovereignty, and the legislation through which it was created was national in its character and objects. The purposes were national, and the benefits of the legislation were intended to be secured to the General Government and to the people in their capacity of citizens of the United States. The power to enact this legislation is derived from a number of constitution provisions, prominent among which are the provisions conferring upon the Congress the power to establish post-roads; to legislate for military purposes; to regulate commerce among the States, and to enact all laws necessary or proper to carry in execution the powers expressly granted.

The power of Congress to create corporations for construction and operation of railways no longer admits of doubt. It is not now a debatable question. Congress stands towards these corporations in the same relation which the State occupies towards corporations of its own creation. It is the sovereign power, the creating power. To it the corporation is answerable. It has all the visitorial powers of government over the corporations of its own creation. Its sovereignty, its right to regulate, and its general powers in respect to these corporations, are paramount and supreme. The right of Congress to establish corporations as agencies through which the powers vested in it by the people might be exer-

cised was first declared and maintained in the case of *McCulloch vs. Maryland*, 4 Wheat.

Chief-Justice MARSHALL's discussion of the powers of Congress in this respect is elaborate, instructive and familiar.

The creation of a corporation whose characteristics and faculties are distinct and familiar, involves the recognition of these characteristics and the grant of power to exercise these faculties. The creation of a bank, with the primary purpose of providing a fiscal agency of government, involves the grant of all powers, and of the right to exercise all faculties appropriately belonging to an institution of that character. All of the appropriate franchises proceed from the Congress, and all are exercisable with its sanction, and subject to alone to its regulation and withdrawal. The faculties which bear a direct and immediate relation to the constitutional object of Congress, are inseparable from those which are auxiliary to these objects and incidental to the agency created.

In the later case of *Osborn vs. The Bank*, 9 Wheat., Chief-Justice MARSHALL said :

" The bank is not considered a private corporation, whose principal object is individual trade and individual profit ; but as a *public corporation*, created for *public* and *national* purposes, that the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the Government, it is admitted ; but the bank is not such an individual or company. It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of of the Court in the case McCulloch vs. The State of Maryland, is founded on, and sustained by, the idea that the bank is an instrument which is *necessary* and *proper* for carrying into effect the *powers vested* in the *Government* of the *United States*. It is not an instru-

ment which the Government found ready made, and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears for national purposes only. *It is, undoubtedly, capable of transacting private, as well as public business.* While it is the great instrument by which the fiscal operations of the Government are effected, *it is also trading with individuals for its own advantage.* The appellants endeavored to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, etc. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business. If there be anything in this distinction it would tend to show that so much of the Act as incorporates the bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional. Congress can make the inanimate body, and employ the machine as a depository of, and vehicle for, the conveyance of the treasure of the nation, if it be capable of being so employed, but cannot breathe into it the vital spirit which alone can bring it into useful existence."

"Let this distinction be considered. Why is it that Congress can incorporate or create a bank? This question was answered in the case of McCulloch vs. The State of Maryland. It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of Government. Can this instrument on any rational calculation, effect its object unless it be endowed with that faculty of lending and dealing in money which is conferred by its charter? If it can, if it be as competent for the purposes of government without as with this faculty, there will be much difficulty in sustaining that essential part of its charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, the vital part of a corporation. It is its soul. And the right to preserve originates in the same principle with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise and destroying its vivifying principle, is precisely as incapable of being

maintained as a distinction between the right to sentence a human being to death, and the right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute. This distinction then has no real existence."

These principles are applicable to the general functions and faculties of any corporations other than a bank, which may be established as an agency of the Government.

In the Pacific Railroad Removal cases, Mr. Justice BRADLEY, delivering the opinion of the Court, said:

"If the case of Osborn against the Bank of the United States is to be adhered to as a sound exposition of the Constitution, there is no escape from the conclusion that these suits against the plaintiffs in error, considering the said plaintiffs as corporations created by and organized under the Acts of Congress referred to in the several petitions for removal in these cases, were and are suits arising under the laws of the United States. An examination of those Acts of Congress shows that the corporations now before us, not only derive their existence, but their powers, their functions, their duties, and a large portion of their resources, from those acts, and, by virtue thereof, sustain *important relations* to the *Government* of the *United States*."

In the creation of corporations for the military and postal purposes of government, Congress may authorize a construction and operation of railroads.

Chief-Justice WAITE, in delivering the opinion of the Court in the case of *Pensacola Tel. Co. vs. Western Union Tel. Co.*, reported in 96 U. S., 1 to 24, used the following language:

"Since the case of Gibbons vs. Ogden, 9 Wheat., 1, it has never been doubted that commercial intercourse is the element of commerce which comes within the regulating power of Congress. Post offices and post

roads are established to facilitate the transmission of intelligence. Both commerce and postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government. The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the *railroad*, and from the railroad to the telegraph, as these new agencies are successfully brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances."

Thus legislating for national purposes Congress may confer upon these corporations the right to transact business at any place within its territorial jurisdiction, and may subject these agencies to such public use as may be incident to their general nature, or desirable in the interest of public good or welfare. In such legislation Congress knows no State line. Its law is supreme and enacted in the interest of the people as a nation. The regulation of commerce among the States is but one of the constitutional powers under which Congress derives sanction for the creation of these railway corporations. In the exercise of the other powers in which such sanction is equally found, State lines are without significance. Its action is supreme, and its authority is exclusive.

"The Government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines."

Pensacola Tel. Co. vs. Western Union Tel. Co., 96 U. S., 1.

The exclusive right of Congress to regulate corporations of its own creation, and the rights of such corporations to exemption from State regulation, have been settled and repeatedly reaffirmed in the decisions of this Honorable Court. The fundamental principle underlying these rights were thus stated by Chief-Justice MARSHALL in the McCulloch case:

"This great principle is that the Constitution and the laws made in pursuance thereof was supreme; that they control the Constitution and laws of the respective States and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corallaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st, that a power to create implies the power to preserve; 2d, that a power to destroy, if wielded by a different hand, is hostile to and incompatible with these powers to create and to preserve; 3d, that where this repugnancy exists, that authority, which is supreme, must control, not yield to that over which it is supreme."
* * *

"The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States to a government whose laws, made in pursuance of the Constitution are declared to be supreme. Consequently the people of a single State cannot confer a sovereignty which will extend over them."

That the franchise of Federal corporations may not be taxed or burdened or their exercise regulated by State legislation is a proposition which the decisions of the Court have excluded from the field of discussion or debate in the present day. The visible and tangible property—the physical property of these corporations,

located within the limits of a State may be taxed by it; and the State may also exercise its police power of regulating the use the property of these corporations. But beyond this the State may not go. It may not touch their franchise or tax, burden or regulate their operations. The limits of the power of the State are clarly defined, and this definition has become a permanent feature of Federal decisions in this line of cases. In the *McCulloch* case Chief-Justice MARSHALL says:

"This opinion does not deprive the State of any resources which they originally possessed. It does not extend to a tax paid by the real property of a bank, in common with the other real property within the state, nor to a tax imposed on the interests which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the State. But this is a tax on the *operations* of the bank, and is, consequently, a tax on the *operation* of an instrument employed by the Government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

And in the *Osborn* case he repeated these views.

Again in the case of Weston vs. City Council of Charleston, 2 Pet., 464, Chief Justice MARSHALL said:

"The sovereignty of a State extends to everything which exists by its authority, or is introduced by its permission; but not 'to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States.' 'The attempt to use' the power of taxation 'on the means employed by the Government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.'"

The case of Union Pacific Railway Company vs. Penniston, 18 Wall., page 5, involved the right of the State of Nebraska to tax the physical property of the company located in the State. In sustaining this right of the State, the Court said:

"It is therefore manifest that exemption of federal agencies from State taxation is dependent not upon the nature of the agents or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government, as they were intended to serve it, or does hinder the efficient exercise of their powers. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their *operations* is a direct obstruction to the exercise of federal powers.'

In the case of California vs. Central Pacific Railway Company, 127 U. S., 1, the Court illustrated the application of this principle to toll charging franchises of railroad companies created as agencies of the general government. The question presented in this case was of the power of the State of California to impose a tax upon the general franchise of the company, including franchises which had been conferred upon it by Congress. The Court, by Mr. Justice BRADLEY, said:

"Another defense set up by the Central Pacific Railroad Company, in the three cases against it, namely, No. 660, 664 and 1157, and by the Southern Pacific Railroad Company, in No. 661, is that the State Board of Equalization included in their assessment in said cases, the value of the franchises conferred upon said Company by the United States, which, it is contended, is repugnant to the Constitution and laws of the United States, and therefore void.

* * * * * *

"Assuming then that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes, and to subserve national ends. It seems very clear that the State of California can neither take them away nor destroy nor abridge them nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the

company situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. What is a franchise? Under the English law, Blackstone defines it as 'a royal privilege or branch of the King's prerogative subsisting in the hands of a subject' (2 Com., 37). Generalized and divested from the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents acting under such conditions and regulations as a government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway or a public ferry or railroad, or charge toll for the use of the same, without authority from the Legislature direct or derived. These are franchises. No private person can take another's property even for a public use without such authority, which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed or render it valueless. As Chief-Justice MARSHALL said in McCulloch vs. Maryland, 4 Wheat., 316, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme laws of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subject to taxation by a State. The power conferred emanates from and is a

portion of the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this Court in McCulloch vs. Maryland, 4 Wheat., 316; Osborn vs. Bank of U. S., 9 Wheat., 738, and Brown vs. Maryland, 12 Wheat., 419; and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decision of this Court in Thompson vs. Union Pacific Ry. Co., 9 Wall., 579, and Union Pacific Railroad Co. vs. Penniston, 18 Wall., 5. As explained in the opinion of the Court in the latter case, the tax there was upon the property of the company, and not upon its franchises or operations, 18 Wall., 35, 37."

In the suit of Farmers' and Mechanics' National Bank vs. Dearing, 91 U. S., 29, the question involved was the right of the States to exercise control over national banks, the inquiry being into the right of the State of New York to pass a usury law that would be binding and controlling upon business done by national banks in that State. Justice SWAYNE, delivering the opinion of the Court in that case, uses the following language:

"The national banks organized under the act are instruments designed to be used to aid the Government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge; being such means brought into existence for this purpose and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.' Against the national will the States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control

the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general Government. * * * 'The power to create carries with it the power to preserve.'" * * *

The Court, after citing the case of Osborn against The Bank, and Weston against Charleston, continues:

"The principle announced in the authorities cited is indispensable to the efficiency or independence, and, indeed, to the beneficial existence of the general Government. Otherwise it would be liable in the discharge of its most important trusts to be annoyed, and thwarted by the will or caprice of every State in the Union. Infinite confusion would follow. The Government would be reduced to a pitiable condition of weakness. The form might remain the same, but the vital essence would have departed. In the complex system of polity which obtains in this country, the powers of government may be divided into four classes:

"Those which belong exclusively to the States;

"Those which belong exclusively to the National Government;

"Those which may be exercised concurrently and independently by both;

"And those which may be exercised by the States, but only with the consent, expressed or implied, of Congress.

"Whenever the will of the nation intervenes exclusively in this class of causes, the authority of the State retires and lies in abeyance until the proper occasion for its exercise shall recur (Gilman vs. Philadelphia, 3 Wall., 713; *Ex parte* McNeil, 13 *Id.*, 240). The powers of the States to tax the existing national banks lies within the category last mentioned.

"It must always be borne in mind that the Constitution of the United States 'and the laws which shall be made in pursuance thereof' are the 'supreme laws of the land' (Constitution, Art. 6). And that *this law is as much a part of the law of each State, and as binding upon its authorities and the people as its own local Constitution and laws.*" [Italics are ours.]

Bank vs. Dearing, 91 U. S., 34, 35.

It is not worth while to consider the proposition made on behalf of the Commission, that the effect of the

acceptance by the Texas and Pacific Company of the Texas Act of May 2d, 1873, was to transfer to the State the right to control and regulate the company's own exercise of its Federal franchises, or to transfer to the State the sovereignty of the general Government over this corporation.

Obviously the purpose of the stipulation was not thus revolutionary. But, in any event, such could not have been the legal result. The company was without power to waive its exemption from State control. The analogy of the Wisconsin insurance case (20 Wall., 445) is complete and conclusive. The case is discussed in complainant's brief, pages and . The Court said:

"Should a citizen of the State of New York enter into an agreement with the State of Wisconsin that in no event would he resort to the courts of that State or to the Federal tribunals within to protect his rights of property, it could not be successfully contended that such an agreement would be valid. We see no difference in principle between the case supposed and the case before us. Every citizen is entitled to resort to all the courts of the country and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. * * * The jurisdiction of the Federal Courts under this clause of the Constitution (Art. 3, Sec. 2) depends upon and is regulated by the laws of the United States. State legislation cannot confer jurisdiction upon the Federal Courts, nor can it limit or restrict the authority given by Congress in pursuance of the Constitution. This has been held many times."

The Court citing Railway Co. vs. Whitton, 13 Wall., 286; Payne vs. Hook, 7 *Id.*, 427; The Moses Taylor, 4 *Id.*, 411, and cases cited.

The company was without power to abdicate, in favor of the State, the control of functions committed

to it by Congress. Nor could any act of the company or any stipulation made between the company and the State divest the General Government of its sovereignty, or substitute therefor the sovereignty of the State. Complainant has presented this argument fully, and, as we believe, conclusively. It shows not only that the company could not make the stipulation in question; but, also, that no such stipulation exists, and that Congress has expressly reserved and retained unto itself the sole and exclusive control of the defendant company.

To summarize:

The result of the decisions of the Supreme Court of the United States upon the points here discussed, may be thus stated:

1. Congress may create corporations as agencies to carry into execution the powers committed to it.

2. This power is not confined to the agencies or instrumentalities known or in use when the Constitution was adopted. It keeps pace with the progress of the country and the new developments of time and circumstance. Railroads may be so created.

3. The discretion of Congress in the creation or selection of such agencies and in the determination of the degree of necessity therefor is exclusive, and is not subject to question or review.

4. The grant of franchises by Congress carries with it the right to exercise these franchises in every appropriate way to transact private as well as public business; in short, to do what railroads usually do.

5. The military, postal and other powers under which the Texas and Pacific Railway Company was created are (with the exception of the commerce power, which is but one of the powers under any one of which the sanction for the creation of the company was complete) exercised without regard to, or constraint by reason of, State lines; and the Federal power to preserve, protect and regulate these agencies, is not subject in its exercise to the limitation of such lines.

6. The laws creating such agencies of the Federal Government are among the supreme laws of the land, and the agencies thus created are exempt from the legislative control of the several States. The reserved powers of the States yield to these supreme laws.

7. This does not exclude the right of the State to tax the physical property of these Federal agencies or to exercise the police power of the State in regulating the use of such property in the interest of public safety.

8. But the State may not tax, regulate or burden their franchises or operations; and, among these franchises, the vital and essential franchises of charging rates and fares for the transportation of property and passengers is especially included.

WINSLOW S. PIERCE,
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Supreme Court, U. S.
FILED
APR 18 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.—No. 1167.

JOHN H. REAGAN ET AL.,
Appellants,

vs.

THE MERCANTILE TRUST COMPANY and THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellees.

Supplemental Suggestion of the Trust Company as to Reviewability of Question of Federal Character of the Railway Company.

JOHN F. DILLON,
E. B. KRUTTSCHNITT,
JOHN J. McCOOK,
Of Counsel for the Trust Company.

C. G. Burgoyne, 146-150 Centre Street, New York.

Supreme Court of the United States.

OCTOBER TERM, 1893.—No. 1167.

JOHN H. REAGAN ET AL.,
Appellants,

vs.

THE MERCANTILE TRUST COMPANY and THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellees.

Supplemental suggestion as to the point concerning the Federal character of the Texas and Pacific Railway Company and its reviewability on this appeal.

The bill and cross-bill set up that the Texas and Pacific Railway Company was a Federal corporation, chartered and existing under an Act of Congress, and that Congress alone had the right to regulate the exercise of its corporate franchises and of its rates and charges. The defendants, constituting the Railroad Commission of Texas, through their counsel, filed a general demurrer to the bill and cross-bill. In addition

to that they allege certain specific grounds of demurrer. The thirteenth and seventeenth specific grounds of demurrer to the original bill, and the fourth ground of specific demurrer to the cross-bill, were to the effect that the Texas and Pacific Railway Company was subject to the power of the State of Texas to regulate the exercise of its corporate franchises and its rates and charges (Record, pp. 104 to 108). The final decree appears on pages 110 to 112 of the record. The Court set down the cause for argument on the demurrers.

The decree recites that

"thereupon, in consideration thereof, the Court considering that the law is in favor of complainant and cross-complainant, except as to the thirteenth and seventeenth grounds of demurrer to the original bill as amended, and as to the thirteenth ground of demurrer to the original bill, adopted as a ground of demurrer to the cross-bill as amended, and as to the fourth ground of demurrer to the cross-bill as amended, it was therefore ordered, adjudged and decreed that said demurrers be and the same are hereby overruled, except said demurrers above named, which are sustained, and the defendants John H. Reagan, William P. McLean, L. L. Foster and Charles A. Culberson, having entered of record their refusal to make further answer and the fact that they stood upon their demurrers and all parties submitting the cause for final decree, it is now, upon consideration thereof, ordered, adjudged and decreed that the bill of complaint as amended and the cross-bill of complaint as amended, in the above-entitled cause be and the same are hereby sustained and taken for confessed;"

and thereupon proceeded to decree in favor of the complainants and cross-complainants.

The brief of the appellants was to be filed under the special order by which this cause and others were submitted, on or before the 13th inst. It was not possible for the appellee to see the brief of the appellant until it was filed.

The first point made in the brief of the appellants (pp. 3 and 4) is that the question of the power of the State of Texas to regulate rates and charges on the railway of the Texas and Pacific Railway Company, being a Federal corporation, cannot be considered on this appeal for the reason that the appellees have not prosecuted an appeal from the ruling of the Court.

It appears, by way of recital in the decree, that the Court in the course of its general decision stated as above shown that it sustained the specific grounds of demurrers of the appellants as to this point.

Of course, we understand the general rule to be that a party not appealing from a decree cannot take advantage of an error committed against himself; but we insist that that principle is not applicable to the peculiar facts of this case. We could not have appealed from anything but the final decree, which *granted all the relief that we asked for in our bill.* When we had a decree for all we asked why the necessity of our taking an appeal? There was no separate decree sustaining the specified grounds of the demurrers of the appellants as to the Federal character of The Texas and Pacific Company, and, therefore, from this ruling an appeal would not lie. The contention of appellants is made plausible by the anomalous practice of considering a general demurrer in connection with specific points in a special demurrer.

The question, we insist, is whether on this record, taking the bill and all of its allegations to be true, the final decree is justified on any of the grounds set forth in that bill. Otherwise, although the federal ground for relief is good, the complainant and cross-complainant could not get the benefit of it.

WE THEREFORE INSIST THAT UNDER THE CIRCUMSTANCES OF THIS CASE, IF THE DECREE BELOW IS CORRECT IN POINT OF LAW UPON ANY OF THE GROUNDS SET FORTH IN THE BILL OF COMPLAINT, INCLUDING THE FEDERAL CHARACTER OF THE TEXAS AND PACIFIC COMPANY, IT OUGHT NOT TO BE REVERSED, BUT AFFIRMED.

April 14, 1894.

JOHN F. DILLON,
E. B. KRUTTSCHNITT,
JOHN J. MCCOOK,
Of Counsel for the Mercantile Trust Company.

Office Supreme Court U.
FILED.
APR 27 1894
JAMES H. McKENNEY,
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SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

No. 1167.

JOHN H. REAGAN ET ALS., APPELLANTS,

versus

THE MERCANTILE TRUST COMPANY AND THE TEXAS & PACIFIC RAILWAY COMPANY, APPELLEES.

REPLY BRIEF FOR FARMERS' LOAN & TRUST COMPANY, APPELLEE, AND FOR RAILWAY COMPANY, APPELLEE.

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WINSLOW L. PIERCE,
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T. H. Thomason, Print, N. O.

SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

No. 1167.

JOHN H. REAGAN ET ALS., APPELLANTS,

versus

THE MERCANTILE TRUST COMPANY AND THE TEXAS & PACIFIC RAILWAY COMPANY, APPELLEES.

REPLY BRIEF FOR FARMERS' LOAN & TRUST COMPANY, APPELLEE, AND FOR RAILWAY COMPANY, APPELLEE.

The appellants in this cause, as in all the others, have fallen into singular errors when they deal with figures. The same answer may be made to them here that we make in all of the cases, to-wit: That if they desired to traverse the allegations as to the confiscatory results following the application of the commission tariffs to the traffic of the defendant Railway Company, they should have done so by answer and by allowing the proper evidence to be submitted to the courts. They preferred to demur after all the facts had been submitted to them through the taking of depositions, and the demurrer admits the effect of the tariffs.

The complainant, as also the cross-complainant, have averred that the operating expenses amounted to a certain sum. The appellants undertook to reject certain items of operating expenses, which they say are not operating expenses, but part of the costs of permanent improvements. No such question can be raised upon a demurrer; but it is really of very little importance in this cause on account of the other more flagrant error into which the appellants have drifted, and which, when corrected, renders this comparatively small error of about three hundred thousand dollars utterly immaterial. The appellants, by deducting only twelve hundred and seventy-nine thousand four hundred and ninety dollars ($1,279,490) for interest on Bonded Debt, reach the conclusion that the railway earned a surplus of two hundred and fifty-six thousand dollars ($256,000) in round figures, over its operating expenses, accrued interest, taxes, etc. The error here lies in the fact that the account to which the appellants refer is an account of interest paid, and of interest constituting a fixed charge, whilst the Company owes twenty-five millions of dollars of Second Mortgage Bonds, the interest upon which has never been paid, and which is not due unless earned. The Railway Company was earning a small portion of this interest, and might in time have done better, when the commission tariffs utterly wiped out this security of the Second Mortgage Bonds, and wiped out all hope of ever collecting any interest on these bonds, unless the tariffs be pronounced illegal, null, and void. This little item of twelve hundred and fifty thousand dollars ($1,250,000) per annum interest due on Second Mortgage Bonds, is entirely overlooked by the appellants.

All of this shows the utter impossibility on a demurrer, of drawing the far-fetched conclusions of fact which the appellants seek to draw, when by their whole conduct of the case in the lower court they have boldly submitted to the Court the question of the right of the Commission to establish confiscatory tariffs—they by their demurrer admitting the confiscatory nature of the tariffs and justifying them.

We respectfully submit that all of these attempted deductions of fact by the appellants are fallacious, and that their theories disappear as soon as the figures are subjected to even the most casual analysis.

Respectfully submitted,

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